

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW
2011**

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Editor

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Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2011. This volume provides a historical record of developments occurring during calendar year 2011, when the State Department's Office of the Legal Adviser marked its 80th birthday since its creation as a statutory entity.¹ For the first time, the State Department is publishing the official version of the *Digest* exclusively on-line. By publishing the *Digest* on-line, we seek to make U.S. views on international law more quickly and readily accessible to our counterparts in other governments and international organizations, scholars, students, and other users, both within the United States and around the world.

The Arab Awakening presented a variety of challenges for the practice of international law in 2011. In addressing events in Tunisia, Egypt, Libya, Bahrain, and elsewhere, the United States government carefully applied what Secretary of State Hillary Rodham Clinton has called "smart power," utilizing a wide array of foreign policy tools to fit the needs of the particular circumstance. In Libya, the U.S. took a multilateral approach, acting quickly at the UN Security Council to pass historic resolutions that established an arms embargo and sanctions regime and made the first ever unanimous referral to the International Criminal Court. Based on Security Council Resolution 1973's authorization for "all necessary measures" to enforce a no-fly zone, and consistent with the War Powers Resolution, the United States was part of a limited, NATO-led military mission in Libya. Various additional legal issues arose during the U.S. response to the situation in Libya, including those related to securing a protecting power, addressing the situation at the United Nations Human Rights Council, recognizing the new Libyan government, and arranging for funds to be made available to the new government using assets of the former regime that had been frozen pursuant to Security Council resolutions. These issues form a significant part of the discussion in several chapters of the 2011 volume of the *Digest*.

In our approach to counterterrorism, applying smart power has meant a continued commitment to the rule of law. In May 2011, the United States completed a lawful operation that resulted in the death of Usama bin Laden, a legitimate target in our conflict with al-Qaida. The United States continued to pursue other leaders of al-Qaida, while ensuring, consistent with President Obama's direction, that all our actions—even when conducted out of public view—comply with our laws and values. The U.S. government's counterterrorism efforts outside of Afghanistan and Iraq have focused on those individuals who present a significant threat to the United States and whose removal would cause a significant disruption of the plans and capabilities of al-Qa'ida and its associated forces. We have worked to uphold our values and the

¹ Our 80th birthday (eight decades after Congress created the office by statute) actually came in our 163rd year of existence. For a review of L's history, culture, and achievements, delivered at a conference attended by many present and former L attorneys, including eight past and present Legal Advisers, see Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 Georgetown Law Journal 1747 (2012), available at <http://georgetownlawjournal.org/files/2012/06/Koh.pdf>.

rule of law in our detention and interrogation policies with regard to terrorism suspects, including pursuing prosecution of detainees through Article III courts and reformed military commissions.

In 2011, the United States government repeatedly brought international law to bear in the domestic law context. For example, the Office of the Legal Adviser continued in 2011 to pursue compliance with the International Court of Justice judgment in *Avena*, by promoting legislation—the Consular Notification Compliance Act—and supporting the request for a Supreme Court stay in a death penalty case involving an *Avena* defendant. We encouraged domestic courts to weigh international law and foreign policy considerations with suggestions or statements on behalf of the State Department in cases involving the immunity of foreign officials; cases considering the constitutionality of legislation implementing international treaty obligations; cases challenging U.S. state laws concerning immigration; and cases seeking relief outside of the compensation arrangements the United States agreed to with Germany and Austria for claims arising out of World War II. In our initial *amicus* brief in the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*, we argued that a corporation can be held liable under the Alien Tort Statute for violations of the law of nations. In the *Zivotovsky* case, we asked the Supreme Court to respect our long-standing policy to recognize no state as having sovereignty over Jerusalem as a crucial part of our efforts to further the Middle East peace process.

Negotiating, joining, and implementing treaties and international agreements remained an important part of U.S. efforts to promote international law in 2011. We secured advice and consent to the Mutual Legal Assistance Treaty with Bermuda and the Bilateral Investment Treaty with Rwanda. In October, we used congressional-executive agreements to adopt free trade agreements with the Republic of Korea, Colombia, and Panama. Also in 2011, the United States signed maritime law enforcement cooperation agreements with Senegal, Nauru, Tuvalu, and Gambia and an agreement with the members of the Arctic Council on aeronautical and maritime search and rescue. The United States actively assisted the 17th Session of the Conference of the Parties to the UN Framework Convention on Climate Change in Durban in launching a process to develop an agreement by 2015 that will apply beginning in 2020. The Obama administration also sought Senate advice and consent for several important treaties in 2011, including protocols to two nuclear weapon free zone agreements; an agreement on preventing illegal, unreported, and unregulated fishing; and Additional Protocol II to the 1949 Geneva Conventions, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts.

We continued our active engagement with international bodies that promote greater understanding of customary international law. We commented on and commended the work of the International Law Commission, including its approval of draft articles on the effects of armed conflict on treaties. In 2011, Professor Sean Murphy of the George Washington Law School was elected a Member of the International Law Commission, restoring U.S. membership after several years' absence. We remained a strong supporter of the UN Commission on International Trade Law, which adopted a revised model law on public procurement and a judicial deskbook on cross-border insolvency in 2011.

In the area of human rights, the United States continued its active participation in UN processes to review states' records on human rights, including the record of the United States. I had the privilege of making the U.S. presentation to conclude our first Universal Periodic Review at the Human Rights Council. The United States also submitted its Fourth Periodic Report to the UN Committee on Human Rights Concerning the International Covenant on Civil

and Political Rights. Our own report on trafficking in persons included for the first time an evaluation of U.S. anti-trafficking efforts. We also achieved some milestones in 2011 in promoting Secretary Clinton's human rights agenda, including passage of landmark Human Rights Council resolution 16/18 on combating discrimination based on religion without limiting freedom of expression, following up by hosting the first meeting of the "Istanbul process" for implementing that resolution. The United States also led the way with initiatives and a Human Rights Council resolution to protect the human rights of lesbian, gay, bisexual and transgender persons, which was echoed in Secretary Clinton's landmark speech on that subject before the Council on Human Rights Day 2011. The release of the U.S. National Action Plan on women, peace, and security and passage of a UN General Assembly resolution introduced by the United States on women's political participation further exemplified the U.S. commitment to promoting human rights.

The Office of the Legal Adviser worked closely with colleagues in other bureaus and departments on a broad array of resolutions considered and adopted during the year by the Security Council, the General Assembly, and other UN bodies, including the adoption and implementation of a range of critically important resolutions related to peacekeeping missions and sanctions programs in various countries around the world, including Sudan, Eritrea, Somalia, and Côte d'Ivoire. In April, the Security Council unanimously adopted Resolution 1977, extending the mandate of the 1540 Committee which promotes implementation of member states' obligations under resolution 1540 to enforce effective measures to counter the proliferation of weapons of mass destruction. In November, the United States joined in a successful General Assembly resolution condemning an Iran-supported terrorist plot against the Saudi ambassador to the United States.

As in the past, the *Digest* has been a team effort. Its preparation and publication continue to rely on efforts of many dedicated members of the Office of the Legal Adviser. For 2011, I want especially to thank former editor Elizabeth Wilcox for her outstanding work and gathering materials and beginning the drafting process for many of the chapters of the *Digest*. Her ongoing availability and expertise have ensured a smooth transition for our new, able and dedicated editor, CarrieLyn Guymon. Among the many L attorneys who voluntarily contributed to the current volume are Kevin Baumert, Jay Bischoff, John Blanck, Violanda Botet, Gilda Brancato, Mary Comfort, Maegan Conklin, Daphne Cook, Paul Dean, Hollin Dickerson, Lara Flint, Kimberly Gahan, Katherine Gorove, Peter Guthrie, Julie Herr, Brian Israel, Jessica Karbowski, Ron Katwan, Elizabeth Kiingi, Emily Kimball, Jeff Klein, Richard Lahne, Jennifer Lansidle, Oliver Lewis, Keith Loken, Anna Mansfield, Julie Martin, Samuel McDonald, Patricia McDonough, Kathy Milton, Dana Montalto, Holly Moore, Lorie Nierenberg, Judy Osborne, Patrick Pearsall, Alexandra Perina, Catherine Peters, Meg Pickering, Shawn Pompian, David Pozen, Nisha Prabhu, Sarah Prosser, Sabeena Rajpal, Phillip Riblett, Christine Sanford, Tim Schnabel, Nina Schou, Jeremy Sharpe, Mallory Stewart, David B. Sullivan, Gabriel Swiney, Jesse Tampio, Margaret Taylor, Jeremy Weinberg, and Erik Woodhouse. Their dedication to this, as to so many other tasks, is only one of the many reasons it is such a joy to work at L.

Once again, I express very special thanks to Joan Sherer, the Department's Senior Reference Librarian, Legal, for her invaluable technical assistance. Jerry Drake, the records manager for the Office of the Legal Adviser, provided enthusiastic help in formatting the *Digest* as an electronic publication, for which I am also very grateful. For me, it is an especially great honor to work at such a distinguished international law firm, with such tradition, esprit and commitment. Finally, I especially thank my colleague CarrieLyn Guymon for taking on the

crucial role of Editor for this volume; we all very much look forward to her continuing, outstanding work on this important enterprise.

Harold Hongju Koh
The Legal Adviser
Department of State

Note from the Editor

For the first time, the official version of the *Digest of United States Practice in International Law* for calendar year 2011 is being published exclusively on-line, both on the State Department's website and on the U.S. government's law-related website, law.data.gov. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2011 volume follows the general organization and approach adopted in 2000. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through the end of May 2012) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2012 where they relate to the discussion of developments in 2011.

Updates on most other 2011 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet cite in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at www.state.gov/s/l/c8183.htm.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <http://documents.un.org>. For UN-related information generally, the UN's home page at www.un.org also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at www2.ohchr.org/english/bodies/hrcouncil. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws,

and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at www.gpo.gov/fdsys, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at www.state.gov/s/l/treaty, and the Library of Congress provides extensive treaty and other legislative resources at <http://thomas.loc.gov>.

The U.S. government's official web portal is www.usa.gov, with links to government agencies and other sites; the State Department's home page is www.state.gov.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:

www.cadc.uscourts.gov/bin/opinions/allopinions.asp;

U.S. Court of Appeals for the First Circuit:

www.ca1.uscourts.gov/?content=opinions/main.php;

U.S. Court of Appeals for the Second Circuit:

www.ca2.uscourts.gov/opinions.htm;

U.S. Court of Appeals for the Third Circuit:

www.ca3.uscourts.gov/indexsearch/archives.asp;

U.S. Court of Appeals for the Fourth Circuit:

<http://pacer.ca4.uscourts.gov/opinions/opinion.htm>;

U.S. Court of Appeals for the Fifth Circuit:

www.ca5.uscourts.gov/Opinions.aspx;

U.S. Court of Appeals for the Sixth Circuit:

www.ca6.uscourts.gov/opinions/opinion.php;

U.S. Court of Appeals for the Seventh Circuit:

www.ca7.uscourts.gov/fdocs/docs.fwx?dname=opinion (opinions) and

www.ca7.uscourts.gov/fdocs/docs.fwx?dname=disp (nonprecedential dispositions);

U.S. Court of Appeals for the Eighth Circuit:

www.ca8.uscourts.gov/opns/opFrame.html;

U.S. Court of Appeals for the Ninth Circuit:

www.ca9.uscourts.gov/opinions/ (opinions) and

www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:

www.ca10.uscourts.gov/clerk/opinions.php;

U.S. Court of Appeals for the Eleventh Circuit:

www.ca11.uscourts.gov/opinions/index.php;

U.S. Court of Appeals for the Federal Circuit:

[www.ca9c.uscourts.gov/index.php?option=com_reports&view=report&layout=se
arch&Itemid=12](http://www.ca9c.uscourts.gov/index.php?option=com_reports&view=report&layout=se
arch&Itemid=12).

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at www.usdoj.gov/osg.

Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service.

Some district courts post all of their opinions or certain notable opinions without requiring users to register for PACER first. For example, the U.S. District Court for the District of Columbia posts its opinions on its website at www.dcd.uscourts.gov/dcd.

Other links to individual federal court websites are available at www.uscourts.gov/links.html.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon

Chapter 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Immigration and Nationality Act

On June 13, 2011, the Supreme Court affirmed the decision of the U.S. Court of Appeals for the Ninth Circuit upholding provisions of the Immigration and Nationality Act, as amended (“INA”) that prescribe the eligibility requirements for U.S. citizens to transmit citizenship to their children born out of wedlock outside the United States. *Flores-Villar v. United States*, 130 S.Ct. 1878 (2011). By a vote of four to four (Justice Kagan was recused), the Supreme Court allowed the Ninth Circuit’s decision to stand without issuing an opinion. The Ninth Circuit’s decision rejected a constitutional challenge to provisions of the INA on equal protection grounds based on the longer requirement for presence in the United States for a U.S.-citizen father than for a U.S.-citizen mother to transmit U.S. citizenship to a child. See *Digest 2010* at 1-6.

2. ILC Draft Articles on Nationality

On October 17, 2011, Steven Hill, Counselor to the U.S. Mission to the UN, spoke on the views of the United States on the work of the General Assembly’s Sixth (Legal) Committee relating to the nationality of natural persons in the event of state succession. Mr. Hill’s remarks appear below and are available at <http://usun.state.gov/briefing/statements/2011/177345.htm>.

* * * *

We greatly appreciate the Sixth Committee’s continued interest in this important item. We also appreciate the efforts of the ILC in preparing draft articles on the nationality of natural persons in relation to the succession of States.

Statelessness in the context of state succession can affect democratization, economic development, and regional stability. We agree with the basic tenet of the draft articles that individuals affected by the succession of States must possess the nationality of at least one of the successor States. Moreover, we urge governments to review their nationality laws to ensure that they do not discriminate against women, members of minority and other vulnerable groups, and to ensure that stateless individuals present within their borders are provided with documentation, protection from abuse, and access to basic services.

As seen in many of the written observations of member states, however, approaches to statelessness that might occur as the result of state succession should take into account factors such as the individual right of expatriation and other legitimate concerns of states in determining policies related to nationality. The balancing of these important considerations merits additional examination and discussion. We believe that the written observations provided by Member States to date in response to several resolutions of the General Assembly provide very useful insights into the perspectives and practices of those States, and we look forward to reviewing any additional member state submissions and to exploring these issues in as practical a manner as possible.

* * * *

B. PASSPORTS

1. Western Hemisphere Travel Initiative Implementation

On June 9, 2011, the Department of Homeland Security (“DHS”) issued a notice, effective on the same date, that the Tribal Card issued by the Pascua Yaqui Tribe is an acceptable document for identity and citizenship for purposes of entering the United States under the Western Hemisphere Travel Initiative (“WHTI”). 76 Fed. Reg. 33,776 (June 9, 2011). For further information on the WHTI, see *Digest 2007* at 8-16.

2. Authority to Determine Content of Passports to Implement Foreign Policy

See Chapter 9.C. for a discussion of the United States brief submitted in the Supreme Court in *Zivotofsky v. Secretary of State*.

C. IMMIGRATION AND VISAS

1. Visa Agreement between the United States and Russia

On July 13, 2011, Secretary of State Hillary Rodham Clinton and Russian Foreign Minister Sergey Lavrov announced an agreement between the United States and Russia on the issuance of nonimmigrant business, tourist, private, and humanitarian visas to the Russian Federation, and for business and tourist visas to the United States, as well as short-term official travel visas to both countries. A July 13, 2011 Fact Sheet issued by the State Department explained that the agreement followed on the joint statement issued during the meeting of President Obama and Russian President Dmitry Medvedev in Deauville, France on May 26, 2011. The July 13 Fact Sheet, available at www.state.gov/r/pa/prs/ps/2011/07/168346.htm, explained:

This agreement will facilitate travel between our two countries and establish stronger ties between our people. The agreement benefits the largest segments of our traveling

Americans and Russians—business travelers and tourists, traveling both as individuals and in groups, by granting as a rule, on a reciprocal basis, multiple-entry visas valid for 36 months.

The agreement also streamlines the visa issuance process by reducing the documentation required. These new visa validity periods will allow for expanded contacts and promote greater mutual understanding between our societies.

On November 19, 2011, Secretary Clinton and Foreign Minister Lavrov exchanged diplomatic notes on the new agreement, bringing it closer to entry into force. A November 19 State Department Fact Sheet, available at www.state.gov/r/pa/prs/ps/2011/11/177398.htm, explained that after the Russian Duma ratifies the agreement, an additional exchange of notes confirming completion of internal procedures would bring the agreement into force. At the end of 2011, the agreement had not yet entered into force.

* * * *

2. Elimination of National Security Entry-Exit Registration System (NSEERS)

On April 28, 2011, the Department of Homeland Security (“DHS”) announced that it was eliminating requirements under the National Security Entry-Exit Registration System (“NSEERS”) that nonimmigrant nationals from certain designated countries comply with special registration requirements, including provision of fingerprints, a photograph, and additional information when applying for admission at a U.S. port of entry. 76 Fed. Reg. 23,830-31 (Apr. 28, 2011). The notice in the Federal Register explained that the Department of Justice had created NSEERS in 2002 pursuant to sections 262(a) and 263(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1302(a) and 1303(a). Regulations under NSEERS provided that the Secretary of Homeland Security, upon consultation with the Secretary of State, would designate certain countries whose nationals would be required to comply with the special registration requirements. Countries so designated included: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. The notice explained the rationale for eliminating NSEERS requirements:

Since its establishment in 2003, DHS has developed substantial infrastructure and adopted more universally applicable means to verify the entry and exit of aliens into and out of the United States. Improved intelligence exchange between the United States and other countries has further informed DHS’s understanding of the threat posed to the United States by international terrorism. Based on global and individualized intelligence, DHS has refined its approach to identifying aliens posing a threat to the nation and applied these techniques to foreign national non-immigrants

generally. As threats to the United States evolve, DHS seeks to identify specific individuals and actions that pose specific threats, rather than focusing on more general designations of groups of individuals, such as country of origin. DHS has implemented and improved the data systems that support individualized determinations of admissibility. DHS established the United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"), in January 2004, to record the arrival and departure of aliens; verify aliens' identities; and authenticate and biometrically compare travel documents issued to non-U.S. citizens by DHS and the Department of State.* Under U.S.-VISIT requirements, most aliens seeking admission to the United States must provide finger scans and a digital photograph upon entry to the United States at U.S. ports of entry. . . . In light of the development of and improvements to the Department's information collection systems and international information sharing agreements, the Secretary has determined that subjecting nationals from designated countries to a special registration process that manually recaptures data already collected through automated systems is redundant and does not provide any increase in security. After careful consideration, the Secretary of Homeland Security, by this notice, is removing all currently designated countries from the listing of countries whose nationals and citizens are required to comply with NSEERS registration requirements.

76 Fed. Reg. 23,830 (Apr. 28, 2011).

3. Expanded authority of consular officers to revoke visas

On April 27, 2011, the Department of State announced a change to its regulations in order to expand the authority of consular officer to revoke visas at any time, in their discretion. 76 Fed. Reg. 23,477-79 (Apr. 27, 2011). The notice in the Federal Register explained why the rule was being changed:

On occasion, after a visa has been issued, the Department or a consular officer may determine that a visa should be revoked when information reveals that the applicant was originally or has since become ineligible or may be ineligible to possess a U.S. visa. Section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i)) (INA) authorizes the Secretary and consular officers to revoke a visa in their discretion. Current regulations limit the circumstances in which consular officers may revoke visas. In light of security concerns, this amendment grants additional authority to consular officers to revoke visas, consistent with the statutory provisions of the INA. Although this rule eliminates the provisions that permit reconsideration of a revocation, it also allows for the provisional revocation of a visa when there is a need for further consideration of information that might lead to a final revocation.

* Editor's Note: For background on the US-VISIT program, see *Digest 2004* at 27-29.

Id.

4. Presidential Proclamation Suspending Entry of Human Rights Abusers

On August 4, 2011, President Barack Obama issued Presidential Proclamation 8697, “Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses.” Daily Comp. Pres. Docs., 2011 DCPD No. 00548, p. 1. President Obama issued the proclamation pursuant to the U.S. Constitution and laws, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. § 1182(f)), and 3 U.S.C. § 301. The proclamation included the President’s determination that it was in the interests of the United States, based on its enduring commitment to respect for human rights, to ensure that the United States is not a safe haven for serious violators of human rights and humanitarian law and those who engage in related abuses. Before issuance of the Proclamation, only those human rights violations specifically enumerated in the Immigration and Nationality Act (e.g., genocide, torture, extra-judicial killings, certain violations of religious freedom) were grounds for inadmissibility to the United States. The Proclamation expanded the grounds for denial of entry into the United States to cover a broader array of recognized violations of international humanitarian law and international criminal law, such as war crimes and crimes against humanity. The proclamation also covers participants in serious human rights violations, such as prolonged arbitrary detention, forced disappearances, slavery, and forced labor, as well as participants in widespread or systematic violence against civilians based on ethnicity or other grounds. The Proclamation was an integral part of President Obama’s broader initiative to strengthen the United States’ ability to prevent mass atrocities abroad, including the establishment of an Atrocities Prevention Board tasked with developing atrocity prevention strategies, discussed in Chapter 17.C.1. Sections 1 through 5 of the Proclamation appear below.

* * * *

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.

(b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where the entry of such person would not harm the foreign relations interests of the United States.

Sec. 3. The Secretary of State, or the Secretary's designee, in his or her sole discretion, shall identify persons covered by section 1 of this proclamation, pursuant to such standards and procedures as the Secretary may establish.

Sec. 4. The Secretary of State shall have responsibility for implementing this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of Homeland Security, may establish.

Sec. 5. For any person whose entry is otherwise suspended under this proclamation entry will be denied, unless the Secretary of State determines that the particular entry of such person would be in the interests of the United States. In exercising such authority, the Secretary of State shall consult the Secretary of Homeland Security on matters related to admissibility or inadmissibility within the authority of the Secretary of Homeland Security.

* * * *

D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

Section 244A of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; *Digest 2004* at 31–33; and *Digest 2010* at 10–11. In 2011, the United States extended TPS designations for Haiti, Sudan, South Sudan, Honduras, and Nicaragua, as discussed below.

1. Haiti

On May 19, 2011, the Secretary of Homeland Security simultaneously extended Haiti's designation for TPS and redesignated Haiti for TPS for a period of 18 months, through January 22, 2013. 76 Fed. Reg. 29,000 (May 19, 2011). See *Digest 2010* at 10–11 for discussion of the original designation of Haiti for TPS on January 21, 2010. Excerpts below from the Federal Register notice announcing the extension and redesignation explain the basis for the action.

* * * *

Over the past year, DHS [the Department of Homeland Security] and the Department of State (DOS) have continued to review conditions in Haiti. Based on this review, and after consulting with DOS, the Secretary has determined that an 18-month extension of Haiti's TPS designation from July 23, 2011 through January 22, 2013, is warranted because the conditions prompting the original designation continue to be met. The Secretary has further determined that these same conditions in Haiti support redesignating Haiti for TPS under INA section 244(b)(1)(C) and changing the "continuous residence" and "continuous physical presence" dates so as to continue affording TPS protection to eligible Haitians who arrived in the United States before January 12, 2010 and to extend TPS protection to eligible Haitians who arrived between January 12, 2010 and January 12, 2011.

The January 12, 2010 earthquake has exacerbated Haiti's position as the least-developed country in the Western Hemisphere and one of the poorest in the world. ...

According to the GoH [Government of Haiti], an estimated 230,000 people died and approximately three million were affected by the earthquake. In total, more than one million Haitians have been left homeless and are currently living in temporary camps. ...

... DOS estimates that there are approximately 1,300 internally displaced persons (IDPs) camps in Haiti. Although statistical reports vary, the United Nations Children's Fund (UNICEF) reports that there are approximately 1.6 million IDPs, of which approximately 800,000 are children. The IDP camps are extremely crowded and are vulnerable to flooding, crime (including gender-based violence), and disease.

... The current cholera outbreak in Haiti is evidence of the vulnerability of the public health sector of Haiti. Although statistical reports have varied, the GoH Ministry of Public Health and Population reported 199,497 cholera cases, including 112,656 hospitalizations and 3,927 deaths. Health officials and aid organizations believe the outbreak may spread nationwide. In efforts to contain the outbreak, a network of cholera treatment centers has been created.

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2. Sudan and South Sudan

On October 13, 2011, the Department of Homeland Security ("DHS") announced the extension of the designation of Sudan for TPS for 18 months through May 2, 2013. 76 Fed. Reg. 63,635 (Oct. 13, 2011). In a separate notice on the same day, DHS announced the designation of the newly-created Republic of South Sudan for TPS for a period of 18 months, through May 2, 2013. 76 Fed. Reg. 63,629 (Oct. 13, 2011). Both the extension and the designation were based on the determination that there was an ongoing armed conflict in Sudan and South Sudan and that extraordinary and temporary conditions exist that prevent nationals of either country from returning in safety. Excerpts below from the Federal Register notice of the designation of the Republic of South Sudan for TPS describe conditions in South Sudan that satisfy the criteria for designation. The notice of the extension for Sudan (not excerpted) includes a similar description.

* * * *

On July 9, 2011, South Sudan became the world's newest nation. Formal independence for South Sudan concluded the interim period of the January 2005 Comprehensive Peace Agreement (CPA) that ended more than two decades of civil war between the Government of Sudan in Khartoum and the Sudan People's Liberation Movement/Army (SPLM/A). These groups had been fighting for the autonomy of South Sudan. While some provisions of the CPA were upheld, many contentious issues remain unresolved and present potential for further conflict.

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During the past two years, South Sudan has experienced increasing violence related to intercommunal conflict, conflict between the SPLM/A and irregular armed forces, and targeted attacks on civilians by the Lord's Resistance Army (LRA). The transitional areas along the North-South border (Abyei, Blue Nile and Southern Kordofan) continued to suffer from inter-tribal tensions, and are flashpoints for violence involving government troops of both sides as well as irregular armed groups.

According to an early 2011 report by the Office of the United Nations High Commissioner for Refugees (UNHCR), during the past two years South Sudan has experienced increasing violence, mostly related to armed militia groups, including LRA and inter-tribal clashes. There are also reports of human rights abuses by southern security forces, including the police and the Sudan People's Liberation Army (SPLA). These reported abuses range from arbitrary detention to the killing of civilians. The SPLA also continues to have child soldiers within its ranks. The United Nations (UN) Security Council established the United Nations Mission in the Republic of South Sudan (UNMISS) to assist with "functions relating to humanitarian assistance, and protection and promotion of human rights." As of May 31, 2011, UNMISS had 9,264 troops out of an authorized 10,000 total military personnel. UNMISS troops have sustained 60 fatalities since the mission deployed.

In January 2011, UNHCR reported that LRA violence displaced some 600,000 additional people in the previous 18 months and has brought "a radical shift in patterns of violence [that] points to a clear targeting of women and children." LRA attacks in the western part of South Sudan were reported on a monthly basis throughout 2010. In most cases, these attacks were on vulnerable, isolated communities, with indiscriminate killing, abduction, rape, mutilation, looting, and destruction of property.

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In addition to the recent violence in Abyei and South Kordofan, there have been other indications that the peace treaty remains fragile. In January and February 2011, factions of the SAF stationed in South Sudan's Upper Nile State engaged in violent clashes. Reports indicated that the soldiers were fighting over weapons and whether they will relocate to the North as ordered after the results of the referendum favored independence. By extension, the failure to demobilize the 180,000 soldiers from both Sudan and South Sudan as required by the CPA is of further concern.

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...According to the U.S. Agency for International Development (USAID), mass population displacement caused by conflict in South Sudan since early 2011 caused the loss of lean season food stocks. As a result, most of the displaced are now in crisis and are relying on food assistance. USAID projects that ongoing conflict will likely impact crop cultivation and harvests and that the situation could worsen significantly because of the compounding impacts of insecurity, displacement, high food prices, and returnees from Sudan who increase competition for scarce resources.

Insecurity due to ongoing fighting, and the targeting of civilians for serious human rights abuses, has led to continued displacement of the South Sudanese population. Displacement and factors related to food insecurity—including drought, flooding, and rising food prices—are at the root of the ongoing humanitarian crisis. South Sudan is already considered one of the poorest, least-developed places in the world. The mass influx of South Sudanese returning from Sudan continues to strain limited resources, and high levels of humanitarian needs are reported in areas that have a high concentration of returnees.

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3. Honduras and Nicaragua

On November 4, 2011, DHS announced the extension of the TPS designation for Honduras for 18 months, through July 5, 2013, based on the continued substantial disruption of living conditions in the country in the aftermath of Hurricane Mitch in 1998 and the finding that Honduras remains unable, temporarily, to handle adequately the return of its nationals. 76 Fed. Reg. 68,488 (Nov. 4, 2011). On the same day, DHS announced the extension of the TPS designation for Nicaragua for 18 months, through July 5, 2013, also based on the substantial impact of Hurricane Mitch in that country. 76 Fed. Reg. 68,493 (Nov. 4, 2011).

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Cross References

Real ID Act, **Chapter 3.A.3.**

Constitutionality of state laws concerning immigration, **Chapter 5.A.**

Protection of migrants, **Chapter 6.F.**

Recognition of South Sudan, **Chapter 9.B.1.**

Executive authority over passport issuance, **Chapter 9.C.**

Travel-related restrictions, **Chapter 16.A.1.a.** (Libya), **16.A.5.a.** (Congo), **16.A.6.b.** (Belarus), **16.B.2.** (implementing Security Council travel bans)

Atrocities Prevention, **Chapter 17.C.1**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Department of State Consular Notification and Access Manual

In September 2010, the Department of State issued the third edition of its manual entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officers to Assist Them* (“Consular Notification and Access Manual”). See *Digest 2010* at 13-22. In 2011, the Executive Branch continued to emphasize the importance of the Consular Notification and Access Manual in enhancing compliance with the Vienna Convention on Consular Relations (“Vienna Convention” or “VCCR”). Excerpts follow from remarks by State Department Legal Adviser Harold Hongju Koh at a Consular Notification and Access Open House held February 8, 2011. The full text of the remarks is available at www.state.gov/s/l/c8183.htm.

* * * *

I’m especially pleased today to be able to announce the release of the third edition of the Consular Notification and Access Manual, a publication that anchors...efforts...to expand awareness by U.S. law enforcement about what to do to comply with the Vienna Convention on Consular Relations—the VCCR—and other consular treaties.

For centuries, a core responsibility of consular officers has been to protect the rights and security of their nationals living and traveling abroad, especially those in vulnerable situations, such as those who find themselves in the custody of a foreign government and face the prospect of navigating an unfamiliar legal system. The customary right to freedom of communication between consuls and their detained nationals was codified in Article 36 of the VCCR in three basic rules: authorities must ask the detainee “without delay” if he or she wants to have the consulate notified; notify the consulate if so; and allow consular access if the consulate requests it. These rules have since been widely applied, and in our view they constitute customary international law, binding even on the small number of countries that have not yet joined the VCCR.

The text of the VCCR itself leaves many critical questions unanswered, such as what it means to notify “without delay.” The international legal obligations codified in Article 36 are exceptional in that it is not the national government, but each individual law enforcement officer in every state and county across the country—almost a million people—who are called upon to implement the rules in actual cases day after day, usually without the federal government ever knowing about the case or needing to get involved. And while compliance is no simple task for any country, law enforcement officers in the United States confront a rather unique set of circumstances. First, few other countries host the volume of foreign nationals that we do, spread

across every corner of the country. Second, America is a melting pot and its citizenry is made up of people of all different backgrounds and cultures. Law enforcement cannot rely on things such as appearance, skin color, or even non-fluency in English as an indication that the person they've arrested is a foreign national. Even explicitly asking each and every arrested person whether they're a foreign national doesn't always solve the problem, because some do not wish to disclose their foreign nationality, and some may not even know they have the citizenship of another country.

Facing these and other challenges, we know that our record of compliance with our obligations has not been perfect. We are all aware of the high-profile cases of recent years in which the United States has been publicly called to account for these shortcomings. We are mindful of our obligations in these cases and are working to remedy those past harms. But the biggest takeaway from these cases is that we must do more moving forward to ensure compliance with our obligations not just in the majority of cases, but in every case. The Department of State is committed to overcoming the challenges and achieving 100 percent compliance with the VCCR and our other consular treaty obligations. We believe these efforts are bearing fruit: compliance has improved steadily over the years thanks in large measure to the outreach efforts of Consular Affairs, but we realize more needs to be done.

The manual represents the centerpiece of our mission to spread the word about consular notification and access and explain how law enforcement should apply the obligation. Much of the advice in the manual is compiled from decades of experience...responding to real-life challenges faced by law enforcement officials in the course of their work. Among many other items, the manual contains instructions on the types of detentions that trigger the obligation to notify; how to determine if someone is a foreign national; how and when to advise the detainee of the option to have the consulate notified; what to do if you cannot communicate with the detainee; when and how the consulate should be contacted; how to accommodate a consulate's request for access; and the restrictions that can and cannot be placed on access. It also contains advice on consular notification for minors, incompetent adults, those involved in sea or air accidents, and deaths, and what to do when the detainee comes from a country with a bilateral treaty requiring notification regardless of the detainee's wishes.

Our commitment to consular notification and access is rooted first and foremost in our respect for the international rule of law. But it is also motivated by considerations of reciprocity. We accord these rights to consular officers in the confident expectation that if the situation is reversed, American consular officers overseas will be accorded equivalent rights to protect our nationals....

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2. *Avena* Implementation and Related Issues

a. Legislation

(1) Consular Notification Compliance Act ("CNCA")

On June 14, 2011, U.S. Senator Patrick Leahy introduced a bill in the U.S. Senate entitled the "Consular Notification Compliance Act," or CNCA, intended to facilitate compliance with the VCCR, as well as the ruling of the International Court of Justice ("ICJ") in the *Case*

Concerning Avena and Other Mexican Nationals (Mex. v. US.), 2004 I.C.J. 12 (Mar. 31) (“*Avena*”). For discussion of *Avena* and prior U.S. efforts to implement the *Avena* decision, see *Digest 2004* at 37-43; *Digest 2005* at 29-30; *Digest 2007* at 73-77; *Digest 2008* at 35, 153, 175-215.

Section 3 of the CNCA would require notice, in accordance with the VCCR, to foreign nationals detained by law enforcement of the option to have their consulate contacted. S. 1194, 112th Congress, 1st Session. Section 4 of the CNCA would create a right for foreign nationals serving a sentence of death at the time of enactment to federal court review of claims that their conviction or sentence had been prejudiced by the denial of such consular notification. *Id.*

On June 28, 2011, U.S. Secretary of State Hillary Rodham Clinton and U.S. Attorney General Eric Holder wrote to Senator Leahy expressing support for the CNCA. 157 Cong. Rec. S4216 (July 29, 2011). Their letter appears below. Secretary of Defense Leon Panetta also sent a letter of support for the CNCA on August 31, 2011. Secretary Panetta’s letter is available at www.state.gov/s/l/c8183.htm.

* * * *

We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration’s strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country’s consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country’s legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps

that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals (Mex. v. US.)*, 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the *Avena* judgment and to comply with the U.S. Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena* and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with *Avena* has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the *Avena* problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

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(2) *Senate hearing on CNCA*

On July 27, 2011, several Executive Branch officials testified at a hearing before the Judiciary Committee of the U.S. Senate on the CNCA. The testimony of Under Secretary of State Patrick Kennedy is excerpted below (with footnotes omitted) and includes a statement by Secretary Clinton. The full text of Under Secretary Kennedy's statement is available at www.state.gov/m/rls/remarks/2011/169182.htm. All witness statements from the hearing can be found at www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba62c686d. The testimony of Deputy Assistant Attorney General Bruce Swartz at the hearing is also available at www.judiciary.senate.gov/pdf/11-7-27%20Swartz%20Testimony.pdf and the testimony of former Legal Adviser John Bellinger is available at www.cfr.org/international-law/fulfilling-treaty-obligations-protecting-americans-abroad/p25562.

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... I appreciate the opportunity to testify today on the proposed Consular Notification Compliance Act. We need swift enactment of this bill to ensure our ability to protect our own American citizens who are detained in a foreign country, to preserve vital international relationships, and to honor our binding treaty obligations.

Secretary Clinton has asked me to underscore that she vigorously supports this bill. She has submitted a statement, which you have before you, that is appended to my written testimony.

The protection of U.S. citizens abroad ranks among the Secretary's and the Department's absolute highest priorities. Senators, all of you have constituents who travel and live overseas. Your constituents are among the 4.5 million Americans who live abroad, the estimated 60 million who traveled abroad last year and the 103 million who hold passports—all of whom depend on consular protections, as much as they depend on passports and visas, to ensure their safe passage through foreign countries. To protect Americans in foreign custody, the Vienna Convention on Consular Relations—a binding U.S. treaty—mandates three simple rules: “ask, notify, and allow access.” Arresting authorities must first *ask* detained foreign nationals if they want their country's consulate notified; if requested, must *notify* the consulate; and, must *allow access* if the consulate seeks to provide assistance. Thus, our ability to secure safe worldwide travel for the millions of Americans who live, work, study, and vacation abroad depends vitally on all countries granting mutual respect to the protective rules in the Vienna Convention. Mr. Chairman, some have asked “why pass this bill, and why pass it now?” For three reasons: to preserve reciprocal treatment for U.S. citizens detained overseas, to protect our vital foreign policy interests, and to maintain our reputation as a country that values and respects the rule of law.

First, the Consular Notification Compliance Act is essential to ensuring that we will be able to protect American citizens. ... In 2010 alone, consular officers conducted more than 9,500 prison visits, and assisted more than 3,500 Americans who were arrested abroad. But the United States cannot ensure that it will be allowed consular access to our citizens abroad—to provide information on foreign legal systems, to facilitate communication with families, and to provide

needed medical assistance—unless it ensures that foreign governments have the same access to their citizens detained here. We strive to ensure U.S. compliance with consular notification because of our strong interest in ensuring that other countries comply with their obligations with respect to our citizens.

* * * *

In the United States, federal, state and local law enforcement officials have in most cases been upholding these obligations for decades...

Overseas, other countries likewise respect our citizens' consular rights. ...When foreign governments fail to provide us with notification or refuse our requests to visit and assist an imprisoned American, we remind them of their obligations under the Vienna Convention, and in most cases, this is enough to secure access.

We find these protections particularly critical for the men and women serving in our Armed Forces, and their overseas dependents. The Department of Defense considers consular access very important for U.S. service members and their families, and the Department expects its personnel who are detained abroad to be able to benefit from a range of assistance from our consulates. In addition, it is in the Defense Department's interests for foreign military personnel who may be arrested or otherwise detained in the U.S. to receive prompt access to their own consulates, in order to ensure that reciprocal protections are also afforded to U.S. personnel who may be detained abroad.

Senators, each of you has faced the traumatic experience of having a constituent detained overseas. In such circumstances, Americans often have nowhere to turn but the consular system. When a U.S. citizen finds him or herself in a foreign government's custody, a consular officer is often the best, and sometimes only, resource that citizen has as he or she navigates a foreign legal system. These consular services are extensive and indispensable. Consular officers provide basic information about a country's legal system and give valuable information on how to find a lawyer. Consular officers conduct regular visits and report back to Washington any mistreatment or poor conditions of detention. They monitor the mental and physical health of detained Americans, communicating concerns about an individual's well-being not just to the detaining authority but also at a diplomatic level. Consular officers are also frequently called upon by our citizens to convey messages to the detained American's family members, legal counsel, or congressional representatives back home. They work to ensure that our citizens have access to food, medicine, or religious items as needed. When an American is put on trial in a foreign country, consular officers often attend the trial and seek to ensure that the proceedings are being conducted in a manner that is fair, transparent, and understandable to the defendant. And through close monitoring by our consular officers of local proceedings involving U.S. citizens arrested overseas, the U.S. government may determine that detention is unjust or illegal, and may call on the detaining government to release the U.S. citizen.

We find these services especially critical in countries that do not respect due process of law and fundamental rights. In many countries a defendant has no protections equivalent to our own from government searches and seizures, no guarantees against cruel and unusual punishment, and no right to a lawyer. But in virtually every country in the world when Americans are imprisoned, the same treaties to which we are a party ensure that they have a right to see their consular officer.

* * * *

...Americans who have recently been detained in such countries as North Korea, Iran, Syria, Pakistan and Libya can tell you from their own experience how indispensable consular notification and access is for the protection of U.S. citizens detained overseas. ...

* * * *

Consular access can be particularly important in countries where we do not have diplomatic relations, as in North Korea where the Swedish Embassy represents the U.S. interests. In November 2010, U.S. citizen Eddie Jun was detained by North Korea. After North Korea finally identified Mr. Jun as a detainee, Swedish diplomats were able to visit Mr. Jun six times and inform the U.S. government that he was being well cared for. At U.S. request, Swedish diplomats continued to ask for regular consular access to Mr. Jun, until his release in May 2011. In short, we strive to ensure domestic compliance with our consular obligations not from altruism, but from keen self-interest. If we fail to honor our consular obligations at home, we can expect your constituents to pay the price overseas.

Second, this legislation is not just vital for the protection of Americans abroad. Ensuring compliance with our legal obligations is essential to our foreign relations and close bilateral relationships. We demand consular notification and access from other countries and in return, we assure them that we will give it ourselves. In most cases, this system works remarkably well. But despite concerted efforts, our record has not been perfect. In certain cases, this system has broken down, and foreign nationals have proceeded through our legal system—at times facing serious charges—without being informed that they can receive the assistance of their consulate, in clear violation of our treaty obligations. The United States has been publicly called to account for these shortcomings in several high-profile cases, including the *Avena* case, in which the International Court of Justice (“ICJ”) found the United States to have violated its Vienna Convention obligations with respect to 51 Mexican nationals who were convicted and sentenced for capital crimes without being informed that they could receive the assistance of their consulate, and ordered that the U.S. judicially review their cases to determine whether the individuals were prejudiced by the violation.

The Bush Administration went to significant lengths to try to secure compliance with the *Avena* judgment. Our ongoing failure to comply has placed great strain on the U.S. relationship with Mexico; Secretary Clinton has stated that our relationship with Mexico is undoubtedly one of the most important bilateral relationships we have. ...

Mexico has stressed on numerous occasions, however, that U.S. compliance with our consular treaty obligations is a priority issue on the bilateral agenda and a matter of significant concern to the Mexican public, and that our non-compliance could seriously jeopardize the ability of the Government of Mexico to continue working collaboratively in these areas. We need swift enactment of the bill before you to resolve our outstanding obligations under the *Avena* judgment, to reaffirm our commitment to our consular notification treaty obligations, and to remove this longstanding obstacle in the bilateral relationship.

The foreign relations implications of this legislation, moreover, reach well beyond Mexico. Other essential U.S. partners, including the United Kingdom, the European Union, Brazil, Spain, and Switzerland, follow this issue closely and have repeatedly and forcefully called upon the United States to fulfill these obligations, often at high levels. As time has passed,

calls for U.S. compliance have become more vociferous. As anyone who has worked in diplomacy understands, such objections can impair our ability to advance U.S. national interests in our bilateral and multilateral relationships in many concrete ways across a spectrum of law enforcement, security, economic, and other concerns. The benefits that will flow from enactment of this legislation, and the continuing harm that will result if it is not passed, will not be limited to the consular sphere but will be felt across a range of issues that are critical to our national interest.

Third, enactment of this legislation is essential to our reputation as a nation that complies with the rule of law internationally. Our treaties are critical to protecting U.S. sovereign interests. U.S. treaties protect our diplomats and government officials overseas, allow us to secure extraditions for our own law enforcement purposes, prevent other states from proliferating nuclear, chemical and biological weapons and from trafficking in certain weapons, secure international cooperation to combat drug trafficking, and facilitate our businesses' international economic relationships. We are constantly negotiating new agreements to advance fundamental U.S. interests and insisting that other states comply with treaty commitments to us that they have already made.

In this increasingly interdependent world, the United States simply cannot afford to have our partners at the negotiating table or those nations whom we ask to fulfill their own legal obligations question our own commitment to the rule of law. When we do not comply with our obligations, we lose credibility in our insistence that other countries respect theirs. Enactment of the Consular Notification Compliance Act will send a strong message to valued international partners that the United States takes seriously its obligations under the Vienna Convention.

* * * *

After the *Avena* decision was handed down, recognizing the important consequences of the decision for the safety of Americans overseas, President Bush took the extraordinary step of directing state courts to give the ICJ judgment domestic legal effect. Although the U.S. Supreme Court determined in *Medellín v. Texas*, 552 U.S. 491 (2008), that this effort was constitutionally insufficient, Chief Justice Roberts' opinion for the Court recognized that judgment as a binding international legal obligation, and agreed that the United States' interests in observance of the Vienna Convention, in protecting relations with foreign governments, and in demonstrating commitment to the international rule of law through compliance with that judgment were "plainly compelling." *Medellín*, 552 U.S. at 524. He further explained that this compliance could be secured by means of legislation.

Picking up where the last Administration left off, this Administration has worked diligently to find the legislative solution the Court recommended. The Consular Notification Compliance Act was developed in close cooperation with the State and Justice Departments, in order to secure narrow, carefully crafted legislation that facilitates our compliance with our current and future consular notification and access obligations, but also takes into account important interests in facilitating normal law enforcement operations and criminal proceedings....

We consider compliance with these obligations so vital, and the harm from noncompliance so irreparable, that the United States requested that the Supreme Court delay the execution of Humberto Leal García, a Mexican national who was subject to the *Avena* judgment and whose execution without affording him the hearing provided by this legislation would

violate our legal obligations. In denying the request, the Supreme Court made clear that Congress is the appropriate body to take action to bring us back into compliance with our obligations. By so saying, the Court left no doubt that Congress can solve this lingering problem, once and for all, by passing this legislation now, before another execution of an individual covered by *Avena* takes place, and causes further damage to our reputation in this area.

* * * *

STATEMENT OF SECRETARY OF STATE HILLARY RODHAM CLINTON

The State Department has no greater responsibility than the protection of U.S. citizens overseas – particularly when Americans find themselves in the custody of a foreign government, facing an unfamiliar, and at times unfair, legal system. Last year alone, our consular officers conducted over 9,500 consular visits with more than 3,500 Americans who were in the custody of foreign governments. Through the international system of consular assistance—a system that has evolved over centuries and today is reflected in binding U.S. treaties—we are able to reach our citizens in these vulnerable situations and help them receive food and medical assistance, communicate with their families, and provide them with information regarding foreign legal systems and how they can access legal counsel overseas. In return, the United States has committed to permit foreign officials to provide the same assistance to their own citizens who are arrested here.

This protective system of consular assistance depends on mutual compliance with these obligations by the United States and our treaty partners. If the United States fails to honor our legal obligations toward foreign nationals in our custody, the fabric of this protective system is torn, and ultimately it is Americans who are harmed. And although we work strenuously to honor these commitments, unfortunately at times our own compliance has broken down.

The bill that is before you—the Consular Notification Compliance Act—is a carefully crafted piece of legislation which seeks to ensure that the United States keeps these treaty promises. The bill provides practical steps for federal, state and local authorities to follow to comply with consular notification rules. It would also give foreign nationals in a small number of very serious cases the chance to prove that they were prejudiced by our own failure to provide them with the opportunity for consular assistance, consistent with our legal obligations.

Enactment of this legislation is also essential to our vital foreign relations interests. Our failure to act, and to act now, threatens our close partnership with Mexico, including in the fight against organized crime and drug trafficking and securing our border. Many other countries, including important U.S. allies, have pressed us to comply with these obligations with increasing urgency. Enacting this legislation will demonstrate to the world that we are a nation that keeps our promises. Failure to enact it invariably will harm our ability to secure U.S. interests across a range of law enforcement, security, and other goals.

To protect our citizens, we need to do our part to protect those of other countries. Because enactment of this bill serves our critical interests in protecting our citizens, preserving our foreign policy relations, and abiding by our promises under vital treaties we have ratified, I join the Department of Justice and the rest of the Administration in urgently calling on Congress to pass this narrow and carefully crafted legislation. Thank you very much.

* * * *

(3) Questions for the record

After the July 27, 2011 hearing, both the Justice Department and the State Department provided responses to questions for the record (“QFRs”) from members of the Senate Judiciary Committee. The excerpt below from the Justice Department responses emphasizes that the CNCA would not impose any new obligations on law enforcement beyond those already required by the Vienna Convention and other treaties. The Justice Department’s responses to QFRs are available in full at www.state.gov/s/l/c8183.htm.

* * * *

Question ...

1. How would you expect S. 1194 to affect law enforcement practices and judicial proceedings? Do you think it would impose any undue burdens on states?

Answer:

We expect that Sections 3—which is intended to facilitate compliance with U.S. obligations under Article 36 of the Vienna Convention on Consular Relations (“Vienna Convention”) and related bilateral agreements—and 4(b)—which ensures consular notification and access and, if necessary, a limited remedy of continuance, for future capital defendants—of S. 1194 would have a minimal impact on law enforcement practices and judicial proceedings, and will not impose any undue burdens on states. The actions needed for these sections are straightforward. Indeed, the obligations for consular notification and access already exist, and have long been met as a matter of course through actions taken by federal, state, and local law enforcement based on training and guidance provided by the State Department, including through the comprehensive manual entitled, *Consular Notification and Access*, available at www.travel.state.gov/consulanotification. Section 3 of S. 1194 provides that federal, state, and local authorities shall inform an arrested or detained foreign national without delay of his or her option to have the consulate notified and thus creates no obligations beyond our existing treaty requirements under the Vienna Convention and related bilateral consular notification treaties. Section 3 further makes clear that such notification should occur no later than the time of a foreign national’s first appearance in court in a criminal proceeding, that federal, state, and local authorities must reasonably ensure that a foreign national in their custody is able to communicate freely with and be visited by his or her consulate, and also that the section does not create any judicially or administratively enforceable right. In sum, Section 3 merely facilitates compliance with current obligations of the United States under the Vienna Convention, and does not add to them.

In Section 4(b), S. 1194 also provides a limited, and non-burdensome, means for ensuring that foreign nationals who are facing federal or state capital charges are afforded consular notification and access when consular notification has not yet taken place. Where a failure to provide consular notice and access is timely raised and substantiated, the foreign national’s consulate shall be notified immediately and the individual shall be afforded consular access in accordance with U.S. legal obligations. Upon a showing of necessity, the court shall postpone proceedings to the extent necessary to allow adequate opportunity for consular access and assistance. Such a remedy—a continuance—is already available to a judge; S. 1194 merely makes clear that such a remedy is available under these limited circumstances, when someone faces federal or state capital charges. Any disruption to judicial proceedings should be

minimal—the length of the continuance necessary to afford notification and assistance. This provision is thus consistent with the Supreme Court’s observation in *Sanchez-Llamas v. Oregon*, that, if a defendant “raises an Article 36 violation at trial [i.e., that consular notification was not provided, as required by Article 36 of the Vienna Convention], a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.” 548 U.S. 331, 350 (2006). Moreover, by ensuring that consular access is made available at this stage of the proceedings, S. 1194 helps ensure that federal and state courts will not face the burden of litigating the failure to provide access in post-trial proceedings. Notably, again, Section 4(b) makes clear that it does not create any other additional judicial or administratively enforceable remedies.

Section 4(a)—the carefully circumscribed retrospective remedy that is designed to meet the treaty obligation of the United States identified by the Supreme Court in the *Medellin* decision—will not impose an undue burden on states or federal courts. Section 4(a) of S. 1194 addresses retrospective Vienna Convention claims of those foreign nationals sentenced to death at the time of enactment of S. 1194. Currently there are approximately 130 foreign nationals under sentence of death in the United States, only some of whom allege they did not receive timely consular notification and access. Section 4(a) provides a carefully tailored, time-limited opportunity for judicial review and reconsideration on federal post-conviction review of the capital conviction and sentence for foreign nationals who were previously sentenced to death at the time of enactment, and who did not receive timely consular notification. While procedural default rules would not bar this opportunity, relief would be available only where a petitioner shows actual prejudice—a high burden which our courts are familiar administering—to his or her conviction or sentence based on the lack of consular notification or access. It should also be noted that Section 4(a) would eliminate the current burden faced by the states and by federal courts in dealing with *Avena* challenges to these convictions. Thus, for this and the foregoing reasons, we do not believe that a substantial additional burden would be imposed by Section 4(a). See *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (noting that in *Medellin* “[t]he cost to Texas of complying with *Avena* would be minimal”); State of Texas, Br. In Opp., Pet’n for Writ of Certiorari in *Medellin v. Texas*, Nos. 08-5573, 08A98, U.S. Sup. Ct., at 17 (August 4, 2008) (Texas “acknowledge[d]” the “international sensitivities presented by the *Avena* ruling” and that “[t]he cost to Texas of complying with *Avena* would be minimal[,]” quoting Justice Stevens).

* * * *

The State Department’s responses to QFRs reinforced the point that treaty obligations under the Vienna Convention already apply to the states. The excerpt below is the State Department’s response to the question from Senator Leahy: “What obligations regarding consular notification currently apply to the states and why?” The full text of the State Department’s responses to QFRs from the July 27, 2011 hearing is available at www.state.gov/s/l/c8183.htm.

* * * *

The Vienna Convention on Consular Relations (“Vienna Convention”) is a multilateral international treaty to which the United States has been a party since 1969. President Kennedy signed the treaty in 1963, and in 1969 President Nixon transmitted the Vienna Convention to the Senate for advice and consent under Article II, Section 2 of the Constitution, which the Senate unanimously provided by a vote of 81 to 0. The United States is also party to over 50 bilateral consular conventions containing similar provisions on consular notification and access. The United States became a party to each of these conventions by ratifying them upon the Senate’s advice and consent. All of these conventions have been the law of the land, binding on U.S. federal, state, and local authorities, since their ratification.

Domestic officials at the federal, state, and local level are obligated under Article 36 of the Vienna Convention² to follow three simple rules with respect to any national of another Vienna Convention party who is arrested or detained in their jurisdiction: authorities must *ask* the individual without delay if he or she wants to have the consulate notified; *notify* the consulate without delay if so; and allow the consulate *access* to the individual if the consulate so requests. “Asking” an individual means that if authorities ascertain that the detained individual is a foreign national, they must tell the individual that he or she may have the consulate notified of the detention. This may be accomplished by asking the individual if he or she is a foreign national, or by informing all individuals taken into custody that if they are a foreign national, they may have their consulate notified. “Without delay” means that the authorities should inform the individual promptly. This means that there should be no deliberate delay, and notification must occur as soon as reasonably possible under the circumstances. In criminal proceedings, this ordinarily means that the person should be informed about the option to seek consular assistance at booking, when identity and foreign nationality can be confirmed in a safe and orderly way. Notification of the consulate “without delay,” in turn, means as soon as possible but generally no later than 72 hours after arrest.³

² Article 36 of the VCCR provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
 - (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
 - (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

³ As noted below, the Federal Rules Committee currently is considering a recommendation from the Department of Justice to amend Rule 5 of the Federal Rules of Criminal Procedure to require that federal courts ensure that consular notification has been provided to foreign national defendants at the time of their first appearance.

For nationals of countries that are parties to relevant bilateral conventions, the rules may differ slightly. Most commonly, bilateral conventions, including those with China, Russia, and the United Kingdom, require state authorities to notify the consulate of an arrest or detention, whether or not the individual requests it. The specific requirements of these “mandatory notification” conventions and other information are provided in the Department of State’s Consular Notification and Access Manual, available at www.travel.state.gov/consularnotification.

These treaty obligations are directly binding on state and local governments, as well as the federal government, by virtue of the Supremacy Clause, Article VI of the Constitution.⁴ See *Hauenstein v. Lynham*, 100 U.S. 483, 489 (1879) (By virtue of Supremacy Clause, “every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State.”); *Kolovrat v. Oregon*, 366 U.S. 187, 190-91 (1961) (provisions in bilateral treaty with Yugoslavia prevailed over inconsistent provisions of Oregon law); *Clark v. Allen*, 331 U.S. 503, 508 (1947) (same for treaty with Germany and California law); *Asakura v. City of Seattle*, 265 U.S. 332, 340-41 (1924) (under the Supremacy Clause, U.S. treaty with Japan was “binding within the state of Washington” and prevailed over a municipal ordinance); *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (“The Supremacy Clause mandates that rights conferred by a treaty be honored by the states.”).

These obligations are also self-executing, and domestic legislation to implement these treaty obligations is not required. In other words, these consular notification and access obligations are already automatically obligatory on federal, state, and local authorities, and implemented through their existing powers.⁵ See, e.g., *Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008) (The Vienna Convention “has the force of domestic law without Congress having to implement legislation.”); *Cornejo v. County of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007) (“There is no question that the Vienna Convention is self-executing. As such, it has the force of domestic law without the need for implementing legislation by Congress.”); *Jogi v. Voges*, 480 F.3d 822, 831 (7th Cir. 2007) (“When the United States Senate gave its advice and consent to the ratification of the Vienna Convention in 1969, . . . the Convention became the ‘supreme Law of the Land,’ binding on the states.”); *Breard*, 134 F.3d 615 at 622 (“The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states.”).⁶ Section 3 of the Consular Notification and Compliance Act merely confirms these existing obligations on federal, state, and local governments, and sets forth the simple, practical steps their officials must take to discharge the treaty obligations.

⁴ The Supremacy Clause provides that “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const., Art. VI.

⁵ The Consular Notification Compliance Act is needed, however, because it will give domestic legal effect to the *Avena* judgment and prevent further violations of the Vienna Convention by enshrining existing treaty obligations on consular notification and access in Federal law.

⁶ It is important to note that the U.S. Supreme Court in *Medellín* did not hold that the consular notification requirements of the Vienna Convention are not binding on the United States or the several states. Instead, it addressed the nature of the International Court of Justice’s judgment in the *Avena* case, holding that the judgment was not, on its own, directly enforceable in state courts even though President Bush had issued an executive memorandum directing state courts to give effect to the judgment. *Medellín v. Texas*, 552 U.S. 491, 522–23, 525–26 (2008).

For decades, federal, state, and local governments have applied the Vienna Convention and bilateral conventions directly on the basis of the relevant treaty language and written guidance such as the State Department's Consular Notification and Access Manual. Many state and local authorities have also issued internal regulations, directives, orders, or similar instructions for their officials. For example, effective January 1, 2000, California adopted legislation setting forth the obligations under state law, Cal. Penal Code § 834c. Texas, Virginia, Indiana, and Wisconsin have all published manuals setting forth consular notification guidance; and a number of local jurisdictions have issued formal policies and guidance to law enforcement, including Peoria and Chandler, Arizona; Bowling Green, Kentucky; Truro, Massachusetts; Suffolk County, New York; and Chesapeake, Virginia.

At the federal level, providing consular notification is standard operating procedure, and is incorporated into the internal procedural manuals and directives of federal law enforcement agencies. The Department of Justice and the Department of Homeland Security (DHS) have promulgated regulations on the steps their officials must take in order to discharge the obligations. *See* 28 C.F.R. § 50.5; 8 C.F.R. § 236.1. Within these agencies, U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the U.S. Marshals Service, the Drug Enforcement Agency, and the Federal Bureau of Investigation, as well as the U.S. Postal Inspection Service and the Internal Revenue Service Criminal Investigation Division, have all issued standard operating procedures relating to consular notification and access.

* * * *

Guidance for federal prosecutors is routinely made available to U.S. Attorneys Offices. Foreign nationals charged with federal crimes eventually may benefit from a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure that would require federal courts to inform individuals at the time of their first appearance that if they are foreign nationals, they have the option to meet with a consular official. In addition, the Uniform Law Commission currently is considering whether to form a drafting committee for similar uniform state legislation.

Furthermore, for well over a decade, the Departments of State and Justice have worked closely with federal, state, and local officials to ensure that they are aware of their consular notification and access obligations and properly discharge them. The Department of State has distributed over one million sets of briefing materials on consular notification and regularly conducts training sessions all over the country. The Consular Notification and Access Manual is the centerpiece of these efforts, explaining the very simple and practical steps that should be taken to fulfill the obligations in real-world contexts. Last year, the Department distributed 6,000 manuals to law enforcement officials. The Department also distributes tens of thousands of small pocket cards each year (70,000 last year) and training videos for law enforcement personnel, maintains updated information on consular notification on its website, www.travel.state.gov/consularnotification, and has a Twitter feed, @ConsularNotify, followed by over 1,200 organizations and individuals, where it provides tips on consular notification practice.

* * * *

b. Humberto Leal García

On July 1, 2011, Mr. Koh sent letters to relevant authorities in Texas—the governor, the attorney general, the district attorney, and the board of pardons and paroles—urging a continuation or modification of the execution date of Humberto Leal García (“Leal”). Leal was one of the Mexican nationals in the *Avena* case, who did not receive consular notification in compliance with the VCCR. As a remedy for the violation, the ICJ ordered the United States to provide review and reconsideration to his (and 50 other Mexican nationals’) sentences and convictions. Mr. Koh’s letter to the governor of Texas, which is substantially identical to his letters to the other Texas officials, is set forth below. The letters asked Texas officials to make all available efforts under Texas law to postpone Leal’s execution date to afford Congress a reasonable time to enact legislation to comply with U.S. international legal obligations. The letters are available as exhibits to the U.S. amicus brief filed in the U.S. Supreme Court in support of Leal’s application for a stay of execution. That brief, with exhibits, is available at www.state.gov/s/l/c8183.htm.

* * * *

I write you urgently regarding the case of Humberto Leal García, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal’s execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*), the International Court of Justice (ICJ) found that Mr. Leal had been convicted and sentenced to death without being informed that he could seek the assistance of the Mexican consulate, in violation of the United States’ obligations under the Vienna Convention on Consular Relations.

His execution on July 7 would violate the United States’ obligations under the ICJ judgment, which required the United States to provide judicial “review and reconsideration” to determine whether Leal’s conviction or sentence was actually prejudiced by the consular violation.

As you know, President Bush sought to secure U.S. compliance with the *Avena* judgment by directing the state courts to provide the requisite review and reconsideration. In *Medellin v. Texas*, 552 U.S. 491 (2008), the U.S. Supreme Court found this effort legally insufficient and recognized *Avena* as imposing a binding international legal obligation, but indicated that Congress could ensure compliance through legislation.

On June 14, 2011, Senator Patrick Leahy introduced S. 1194, the Consular Notification Compliance Act of 2011 (CNCA) (attached), which, if enacted, will bring the United States into compliance with our *Avena* obligations by providing for post-conviction review of Vienna Convention violations for Mr. Leal and other foreign nationals currently on death row. This legislation was developed in close consultation with the Administration, and as the attached letter of June 28 from the Secretary of State and the Attorney General indicates, the Administration strongly supports it. However, enactment of this legislation necessarily will take some time. I therefore respectfully request that you secure a continuance or modification of Leal’s execution

date at this time to afford a reasonable opportunity for Congress and the President to achieve compliance with the United States' international obligations.

This request is not a comment on either the conviction or sentence in this case, or on whether Mr. Leal or any other individual would be able to demonstrate actual prejudice. Rather it is simply a request that Texas authorities help us take the steps that both the Supreme Court and the Texas Court of Criminal Appeals have recognized are necessary to bring the United States into compliance with outstanding international law obligations. As the Supreme Court in *Medellin* made clear, Texas itself could satisfy the United States' international legal obligations in this matter, by providing Mr. Leal with a hearing that would give appropriate judicial review and reconsideration of his conviction and sentence under circumstances in which the reviewing court had legal authority to award any appropriate relief. Just this week, three judges of the Texas Court of Criminal Appeals recognized the undisputed, binding obligations the *Avena* judgment creates for the United States and the State of Texas, and called for Texas officials to take action to secure Mr. Leal a stay during the pendency of federal legislation.

A temporary delay of Mr. Leal's execution date would not prejudice Texas's important and legitimate law enforcement interests, and it would protect compelling long-term interests of both the United States and the State of Texas. Ensuring compliance with our international consular obligations here at home is essential to ensuring that American citizens from Texas and other states can benefit from U.S. consular assistance if they are detained abroad. Like all Americans, Texans who travel and are detained overseas rely upon precisely the kind of consular notification that was not given here. Mexico has also made clear that Mr. Leal's execution in breach of our international obligations would seriously jeopardize the ability of the Mexican Government to continue cooperating with the United States on cross-border law enforcement and security and other issues of critical importance to the State of Texas. In the one prior case in which Texas executed a Mexican national subject to the *Avena* judgment—that of Jose Ernesto Medellin in 2008—Mexico brought a second suit against the United States in the ICJ, which found that the execution constituted another violation. We are concerned that the execution of Mr. Leal, without his receiving the review and reconsideration to which he is entitled under *Avena*, would simply trigger another round of international litigation damaging to our foreign policy interests.

For these reasons, the United States has a compelling interest in ensuring that this case does not result in a breach of U.S. international law obligations. I therefore ask you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation, so that we can avoid the significant damage to United States interests that would result from an execution in violation of our international obligations. Identical copies of this letter are being sent to the Texas Attorney General, the Texas Board of Pardons and Paroles, and the Bexar County District Attorney.

* * * *

In July 2011, the Obama Administration filed an *amicus* brief in the Supreme Court of the United States in support of a petition for a stay of execution filed by Mr. Leal. The U.S. brief is excerpted below, with most footnotes and references to the submissions in the case omitted. The full brief is available at www.state.gov/s/l/c8183.htm. The brief argued that Mr. Leal's execution should be stayed in order to comply with international legal

obligations under the Vienna Convention and the ruling in the *Avena* case. The brief also relied on the recent introduction of the CNCA in the U.S. Senate (see discussion in section A.2.a, above). On July 7, 2011, the Supreme Court issued its decision denying the stay. *Garcia v. Texas*, 131 S.Ct. 2866 (2011). Four justices dissented, and their opinion relied heavily on the arguments in the U.S. brief.

* * * *

This case implicates United States foreign-policy interests of the highest order. Indeed, this Court has recognized those interests to be “plainly compelling.” *Medellin II* [*Medellin v. Texas*, 552 U.S. 491 (2008)], at 524. Petitioner’s execution would cause irreparable harm to those interests by placing the United States in irremediable breach of its international-law obligation, imposed by the ICJ’s judgment in *Avena*, to provide judicial review of petitioner’s Vienna Convention claim. That breach would have serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention.

Efforts on the part of Congress and the Executive Branch to satisfy the United States’ obligation under *Avena* have resulted in the recent introduction in the Senate of the Consular Notification Compliance Act (CNCA). The CNCA would provide petitioner the procedural remedy that the United States is obligated to provide under international law: review and reconsideration of his Vienna Convention claim. The CNCA is currently under active consideration in Congress; the Chairman of the Senate Judiciary Committee has announced his intent to hold a hearing on the bill in July. The Executive Branch participated in the development of the legislation and the Secretary of State and the Attorney General have publicly expressed their strong support for its enactment. That support distinguishes this case from *Medellin III*, in which this Court held that the possibility of enactment of a previous bill was “too remote” to warrant the issuance of a stay, in the absence of any statement from the Executive Branch about the likelihood of Congressional action. [*Medellin v. Texas*,] 554 U.S. [759 (2008) (per curiam)] at 759-760; see *id.* at 760 (“The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention.”). While enactment of the Senate bill cannot be assured, in developing and advancing this legislation, the political branches, acting in coordination, have made greater efforts to achieve compliance with *Avena* than at any previous time.

Given these circumstances—petitioner’s imminent execution date, the breach of United States’ legal obligations that will ensue, the significant and detrimental foreign-policy consequences that will follow from such a breach, and the pendency of legislation that would avert those harms—the Court should stay petitioner’s execution until the adjournment of the current session of Congress (which must occur no later than January 3, 2012) in order to allow the United States additional time to meet its international-law obligations. The exercise of this Court’s discretion to grant such a stay is consistent with the equitable principles that have guided this Court’s decisions with respect to stays of execution.

Ordinarily, for the Court to grant a stay in a capital case, “there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court’s decision; and there must be a likelihood

that irreparable harm will result if that decision is not stayed.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation and internal quotation marks omitted). In this case, those factors must be tailored to the basis for the requested stay, *i.e.*, the introduction of legislation in Congress would, if enacted, afford petitioner the review and reconsideration that the United States has an undisputed international-law obligation to provide. The application of the traditional stay factors in this context must consider whether petitioner would have a right to federal-court review and a stay of execution under the legislation that has been introduced; whether petitioner—and vital national interests—would be irreparably harmed by denial of a stay; whether the grant of the stay would cause significant harm to the State of Texas; and what impact the grant or denial of a stay would have on the public interest. See *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009). Those stay factors are addressed to this Court’s discretion. *Id.* at 1760-1761. Here, consideration of those factors justifies the exercise of the Court’s discretion to grant a stay.

1. Congress’s enactment of the CNCA would provide petitioner with the procedural right to federal-court review of his Vienna Convention claim. The United States has consistently acknowledged that it has a treaty-based obligation to provide that procedural right under *Avena*. See Gov’t Br. at 38, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (*Medellin I*) (“[T]he United States has an international obligation under Article 94 [of the United Nations Charter] to comply with the *Avena* decision.”); *Medellin II*, 552 U.S. at 504 (“No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States.”) (emphasis omitted). Under *Avena*, the United States is required to provide review and reconsideration of the convictions and sentences of the affected Mexican nationals in the decision, including petitioner, because of the United States’ failure to provide required information about consular notification and assistance. *Medellin II*, 552 U.S. at 502-503. *Avena* requires such review without regard to any state procedural-default rules. *Id.* at 503.

In 2005, President Bush acknowledged the international legal obligation created by *Avena* and determined that the United States would discharge that obligation by “having State courts give effect” to *Avena* in the cases, including petitioner’s, that were addressed in that decision. *Medellin II*, 552 U.S. at 503. That determination reflected the President’s considered judgment that the United States’ foreign-policy interests in meeting its international obligations and protecting Americans abroad required the United States to comply with the ICJ’s decision. In *Medellin II*, the United States reaffirmed the important interests implicated by its compliance with *Avena*, including “(1) the importance of securing reciprocal protection of Americans detained abroad; (2) the need to avoid harming relations with foreign governments, including Mexico; and (3) the interest in reinforcing the United States’ commitment to the rule of law.” U.S. Amicus Br. at 11, *Medellin II*, *supra* (No. 06-984). This Court agreed that the government’s interests in “ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law * * * are plainly compelling.” *Medellin II*, 552 U.S. at 524. Protecting those compelling interests is a sufficiently important matter to warrant this Court’s intervention. See *Medellin III*, 554 U.S. at 761-762 (Stevens, J., dissenting) (noting that the importance of the interests at stake warranted granting a stay and calling for the views of the Solicitor General); *id.* at 762 (Souter, J., dissenting) (same); *id.* at 762-763 (Ginsburg, J., dissenting) (same); *id.* at 763-766 (Breyer, J., dissenting) (same).

2. The pendency of the CNCA in the Senate, with the full support of the Executive Branch, creates a sufficient likelihood of petitioner's receiving judicial review and reconsideration of his Vienna Convention claim to satisfy the first stay consideration, *i.e.*, likelihood of success on the merits. The merits here consist of a procedural opportunity, not a right to a substantive outcome.

a. In *Medellin II*, this Court observed that "[t]he responsibility" for implementing the United States' international legal obligation to comply with *Avena* "falls to Congress." 552 U.S. at 525-526. In the immediate aftermath of *Medellin II*, a bill to implement the decision was introduced in the House of Representatives, see *Avena Case Implementation Act of 2008*, H.R. 6481, 110th Cong. (2008), but that bill was introduced without Executive Branch participation or consultation, and it was not enacted. Following that effort, the various interested Departments of the Executive Branch, working with Congress, painstakingly negotiated and developed legislation that would implement *Avena*, while balancing the interests in preserving the efficiency of criminal proceedings and protecting the integrity of lawful criminal convictions. The resulting bill, the CNCA, was introduced by Senator Leahy on June 14, 2011.

The Executive Branch has strongly endorsed the CNCA in a letter to Senator Leahy signed by the Secretary of State and the Attorney General. The letter explains that enactment of the CNCA is "essential" to the government's "ability to protect Americans overseas and preserve some of [its] most vital international relationships." On June 29, 2011, Senator Leahy reiterated the crucial importance of the CNCA "to ensuring the protection of Americans traveling overseas" and to restoring the Nation's "image as a country that abides by its promises and the rule of law." Cong. Rec. S4215-S4216 (June 29, 2011). Noting that "productive discussions with Republicans and Democrats from both the House and Senate" have begun, Senator Leahy, "[a]s [C]hairman of the Senate Judiciary Committee, * * * announc[ed] that [he] intend[s] to hold a hearing on this critical issue in July." *Id.* at S4216.

The introduction of the CNCA, with the support of the Executive Branch, represents an important step by the political branches toward fulfilling the United States' international-law obligation to implement the *Avena* decision. The CNCA provides for judicial review and reconsideration, without regard to procedural default rules, of the capital convictions and sentences of foreign nationals, such as petitioner, who did not receive timely consular notification. CNCA § 4(a)(1). The CNCA also provides that the district court must enter a stay if necessary to allow that review to take place. CNCA § 4(a)(2). If and when enacted, the CNCA would therefore satisfy the United States' international-law obligation to comply with the *Avena* judgment for petitioner and other covered individuals. And it would give petitioner an enforceable legal right to judicial review of his Vienna Convention claim.

b. The right that petitioner would vindicate under the CNCA is an opportunity for judicial review and reconsideration. Neither *Avena* nor the CNCA would guarantee petitioner a particular outcome. That is because the international-law obligation is one of process, not result. *Avena* does not require the United States to grant relief for a consular notification violation; it requires only an opportunity for review and reconsideration through an adequate judicial process. Petitioner contends that he is likely to show that the Vienna Convention violation caused him prejudice. A tribunal with jurisdiction to address that claim would evaluate petitioner's submission in light of the "overwhelming" evidence "at both phases of [petitioner's] capital murder trial." *Leal v. Dretke*, 2004 WL 2603736, at *18. Under the CNCA, the court would conduct an evidentiary hearing, if necessary, before determining whether petitioner had shown "actual prejudice." CNCA § 4(a)(3). At this time, however, petitioner's likelihood of success at

such a proceeding is not the relevant issue. A stay should instead turn on the likelihood of petitioner's obtaining the *procedural* opportunity for review.

In *Medellin III*, the Court stated that a showing of prejudice (there, "that [the defendant's] confession was obtained unlawfully") would have to be "[t]he beginning premise for any stay." 554 U.S. at 760. The Court then noted that such a showing of unlawfulness "is highly unlikely as a matter of domestic or international law." *Ibid*. But a likelihood that petitioner would actually obtain relief by review and reconsideration should not be required in the present context. A stay is warranted to protect the United States' interest in adhering to the rule of international law in affording petitioner the hearing required by *Avena*. Execution of petitioner without compliance with *Avena* would produce a further breach of the United States' international-law obligations and gravely harm the United States' foreign-policy interests. Because the breach of those obligations would result from the United States' failure to provide petitioner review and reconsideration, the stay should turn, not on whether he can show a likelihood of prejudice to his trial or sentence, but on whether a sufficient likelihood exists that additional time would enable petitioner to receive the *procedural remedy* that *Avena* requires.

Significantly, petitioner has not yet received the judicial review and reconsideration of his claim that *Avena* requires. In petitioner's first state habeas proceeding, the court addressed petitioner's Vienna Convention claim relating to his non-custodial statements, but it held that the Vienna Convention was not violated and, accordingly, it did not consider the issue of prejudice. Although the district court considering petitioner's second federal habeas petition opined that "there is no arguable merit to petitioner's claim that he sustained 'actual prejudice'" as a result of the Vienna Convention violation in his case, *Leal v. Quarterman*, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519, at *7, it made that statement only after determining that it lacked jurisdiction, *id.* at *5, and the Fifth Circuit vacated that portion of its opinion, 573 F.3d 214, 224-225 (2009). A determination by a court that lacked jurisdiction does not satisfy *Avena*.

Review and reconsideration under the provisions of the CNCA would satisfy *Avena*. If petitioner receives that review, the United States will have discharged its obligations under *Avena*, even if petitioner fails to show actual prejudice. Conversely, if petitioner does not receive judicial review and reconsideration of his Vienna Convention claim, the United States will have violated its obligations, whether or not there was a reasonable possibility that petitioner could have shown prejudice. See *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2008 I.C.J. 311, ¶ 76 (July 16) (noting acknowledgment by the United States that if petitioner were "executed without the necessary review and reconsideration required under the *Avena* Judgment, that would constitute a violation of United States obligations under international law").

c. Because the CNCA has not yet been enacted, no currently pending case under the provisions of that bill exists. Nevertheless, the All Writs Act, 28 U.S.C. 1651, authorizes this Court to enter a stay to preserve its potential future jurisdiction. That statute provides in relevant part that "[t]he Supreme Court [and other federal courts] may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). It is well established that the Court's power under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (emphasis added); see *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984).

If the CNCA is enacted, petitioner can initiate review of his Vienna Convention claims in a federal district court. CNCA § 4(a)(1). He would then be statutorily entitled to a stay of execution, if necessary, “to allow the court to review [his] petition.” CNCA § 4(a)(2) (“the court shall grant a stay of execution”). Should the decision in that proceeding be unfavorable to him, he will be able to appeal by obtaining a certificate of appealability upon a “substantial showing of actual prejudice to [his] criminal conviction or sentence * * * as a result of a violation of Article 36(1) of the Vienna Convention.” CNCA § 4(a)(6)(B). And the decision of the court of appeals—whether based on a consideration of the merits of an appeal or based on the denial of a certificate of appealability—will be subject to review in this Court under 28 U.S.C. 1254(1). See *Hohn v. United States*, 524 U.S. 236 (1998). The All Writs Act permits this Court to grant a stay to protect that potential future jurisdiction.

d. Because the CNCA has not yet been enacted, existing domestic law does not afford petitioner a right to review and reconsideration. But in determining whether a stay applicant has shown a significant possibility of success, the Court may take into account the possibility of a change in the law. See, e.g., *San Diegans for Mt. Soledad Nat’l War Mem’l v. Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting a stay in part because the case could be affected by a city ordinance whose validity was being litigated in state court). Indeed, the Court routinely does so when the possible change would result from a judicial decision in a pending case. See, e.g., *California v. Hamilton*, 476 U.S. 1301, 1302-1303 (1986) (Rehnquist, J., in chambers) (granting stay because “[o]ur decision in *Rose v. Clark* may well affect the outcome of the instant case”). So long as an applicant can show a reasonable possibility of a change in the law that will entitle him to relief, the source of the change is not relevant.

Because of the active and unequivocal support of the Executive Branch for the CNCA, this case is significantly different from *Medellin III*. In that case, Medellin sought to delay his execution so that either Congress or the Texas Legislature might have the opportunity to enact legislation implementing *Avena* and requiring domestic courts to provide review and reconsideration of his procedurally defaulted Vienna Convention claim. 554 U.S. at 759. This Court held that the possibility of enactment of legislation, which had “not progressed beyond the bare introduction of a bill,” was “too remote” to warrant issuance of a stay, where “neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action.” *Id.* at 759-760. Here, by contrast, the heads of the Departments of State and Justice have communicated to Congress the Executive Branch’s full support for the legislation, emphasized its critical importance to United States interests, and urged Congress to enact it. The Executive Branch’s active participation in the development of this legislation, and support for its enactment, make the possibility of Congressional action more likely, and therefore less “remote,” than it was in *Medellin III*.

This case is therefore more akin to those in which the Court has exercised its discretion to stay its mandate in order to provide Congress with a reasonable opportunity to enact legislation in light of a judicial decision. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 & n.40 (1982) (ordering a “limited stay” in order to “afford Congress an opportunity” to enact legislation that would “reconstitute the bankruptcy courts” in response to the Court’s decision); *Buckley v. Valeo*, 424 U.S. 1, 142-143 (1976) (per curiam) (entering a stay to afford Congress an opportunity to reconstitute the Federal Election Commission). Those authorities suggest that, in circumstances affecting vital government interests, this Court may exercise its discretion under the All Writs Act to maintain the status quo for a limited period in order to provide an opportunity for Congress to take necessary action.

3. Petitioner's execution would cause irreparable harm to important foreign-relations interests that this Court has described as "plainly compelling." *Medellin II*, 552 U.S. at 524. The execution would irremediably violate the United States' international-law obligation to comply with the ICJ's judgment in *Avena*. It would also violate the United States' specific commitments to the international community that it would work to give effect to that judgment. See *Medellin III*, 554 U.S. at 762-763 (Ginsburg, J., dissenting) (quoting representation by the United States that it continues to seek to give full effect to the *Avena* decision); *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2009 I.C.J. 3, 61 (Jan. 19) (noting "the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment" as well as "the undertakings given by the United States of America in these proceedings"). Those violations would cause irreparable harm to the foreign-policy interests of the United States.

Most immediately, petitioner's execution would result in serious damage to United States relations with Mexico. The United States' failure to comply with *Avena* has generated increasing concern by the Mexican government and thus posed an ever-greater obstacle to United States-Mexican relations. Those relations are enjoying an unprecedented level of cooperation but they are also unusually sensitive, so that a breach resulting from petitioner's execution would be particularly harmful. As explained in a letter to the Secretary of State from the Mexican Ambassador, the United States' "continued non-compliance with the ICJ's decision has already placed great strain on [the] relationship" between the United States and Mexico. Letter from Arturo Sarukhan, Ambassador of Mexico, to Hillary Clinton, Secretary of State (Jun. 14, 2011). "[A] second execution in violation of the ICJ's judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States" on important law-enforcement initiatives, "including extraditions, mutual judicial assistance, and our efforts to strengthen our common border." ...

Petitioner's execution would also harm relations between the United States and other countries and regional and multilateral institutions that "have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena*." [Letter from Hillary Rodham Clinton, Secretary of State, and Eric H. Holder, Jr., Attorney General, to Senator Patrick J. Leahy (Jun. 28, 2011) ("State/Justice Letter").*] The European Union has sent repeated inquiries to the United States about this issue in general, and petitioner's execution in particular. Other Nations, including the United Kingdom, have sent multiple communications that have raised the issue of *Avena* compliance at high levels. The European Union, Chile, El Salvador, Honduras, Switzerland, and Uruguay have similarly written the Governor of Texas to urge him to grant petitioner a reprieve to allow time for passage of legislation to implement *Avena*. Cf. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (noting that "repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes" with foreign powers can be sufficient to establish for purposes of preemption that a state's action interferes with the national government's "diplomatic objectives").

Perhaps most important, petitioner's execution could seriously undermine the ability of the United States Government to protect United States citizens who are detained in foreign countries. As the Attorney General and Secretary of State have explained, "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." *State/Justice Letter*. In Fiscal Year 2010, United States consular officials assisted more than

* Editor's note: The State/Justice letter is reprinted in Section 2.a., *supra*.

3500 United States citizens who were arrested abroad and conducted more than 9500 prison visits. Consular assistance has proved essential to affording needed assistance in several sensitive recent cases involving Americans detained in Egypt, Libya, Syria, Iran, and Pakistan, among other countries. Respecting international rules for consular notification is a matter of paramount importance for Americans detained overseas, as foreign nationals detained in the United States usually have a constitutional right to counsel, whereas United States citizens detained in many foreign countries do not. “The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States.” *Ibid.* Compliance with those obligations is therefore essential in “ensuring that U.S. citizens detained overseas can receive critical consular assistance.” *Ibid.* By contrast, failure to comply with *Avena* will weaken the force of the United States’ insistence that other countries respect those rules; an internationally high-profile execution while remedial legislation is pending would greatly exacerbate that problem.

Finally, the interests served by affording Congress an opportunity to implement the United States’ international-law obligations and to prevent the significant damage to the United States’ foreign relations flowing from any further breach of those obligations outweigh the State’s interest in the immediate enforcement of its judgment. In balancing the equitable principles that govern the issuance of a stay of execution, the Court has recognized the “State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). But in this instance, the State’s own conduct put the United States in breach of its international obligations, and the State had, and continues to have, the power to remedy that breach and to avoid a further violation in this case. And the Court has recognized that the United States’ interests in demonstrating that it respects the rule of law internationally, protecting its citizens who live or travel abroad, and preserving cooperation with Mexico and other nations are “plainly compelling.” *Medellin II*, 552 U.S. at 524. Because the damage to those interests in the absence of a stay would be permanent and irreparable, as compared to the temporary disruption of the State’s enforcement of its judgment that a stay would cause, the balance of equities favors a stay until the adjournment of the current session of Congress.

* * * *

B. CHILDREN

1. Adoption

a. Russia

On July 13, 2011, Secretary Clinton and Russian Foreign Minister Sergey Lavrov signed a bilateral agreement “Regarding Cooperation in Adoption of Children.” The agreement will enter into force after the two sides exchange diplomatic notes confirming that each has completed the internal procedures necessary for entry into force, which for Russia includes approval by its Duma. The State Department’s fact sheet on the agreement explained:

This Agreement will provide additional safeguards to better protect the welfare and interests of children and all parties involved in intercountry adoptions. Under the Agreement, only adoption agencies authorized by the Russian government will be able to operate in Russia and provide services in adoptions covered by the Agreement, except in the case of an adoption of a child by his or her relatives. This will largely eliminate independent adoptions from Russia and create a better defined framework for intercountry adoptions between the United States and Russia. The Agreement also includes provisions designed to improve post-adoption reporting and monitoring and to ensure that prospective adoptive parents receive more complete information about adoptive children's social and medical histories and anticipated needs.

Fact sheet, Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children, available at www.state.gov/r/pa/prs/ps/2011/07/168180.htm. Further explanation of the agreement appeared in State Department Frequently Asked Questions ("FAQs"), excerpted below, and available in full at http://adoption.state.gov/content/pdf/FAQs_re_Agreement_07_13_2011_FINAL2.pdf.

* * * *

Q: Does this mean that the United States does not want Russia to join The Hague Intercountry Adoption Convention?

In order to promote stronger safeguards for children in the intercountry adoption process between our two countries within our existing legal authorities, the United States and Russia negotiated the Agreement, which incorporates several elements of The Hague Convention.

* * * *

Q: Whom does the Agreement cover?

The Agreement will cover adoptions to and from the United States and Russia. It applies to children up to the age of 18 who are citizens of and habitually resident in one country, and who are adopted in their country of origin by spouses habitually resident in the other country (at least one of whom is a citizen of that country), or by an unmarried individual who habitually resides in and is a citizen of the other country.

Prospective adoptive parents should also be aware that the Agreement only covers adoptions where both spouses, or the individual (if unmarried), have seen and observed the child in person prior to adoption and personally participated in the decision-making procedures by the court issuing the adoption decree.

Q: Will the Agreement change U.S. visa processing for adopted children?

The Agreement will not significantly impact visa processing for children adopted from Russia. The processing of an adopted child's U.S. visa occurs after the adoption in Russia and the approval of the orphan petition (Form I-600, *Petition to Classify Orphan as an Immediate Relative*) by USCIS. Information on how to adopt from Russia is available on www.adoption.state.gov.

Q: What will change as a result of this Agreement?

Three aspects of the current intercountry adoption process will change:

No independent adoptions

Russia will no longer permit independent adoptions (i.e., adoptions where the prospective adoptive parents elect to act on their own behalf without facilitation by an adoption agency), unless a child is being adopted by a relative. Once the Agreement enters into force, non-relative adoptions from Russia must take place with the facilitation of an authorized organization. Relatives are defined in accordance with Russian law.

Prospective adoptive parent preparation and training

U.S. prospective adoptive parents may be required to obtain additional special training in light of their particular matched child's special needs. The new procedures called for by the Agreement will help ensure that prospective adoptive parents receive all available information on the child's social and medical history, possible special needs, and availability for intercountry adoption before the adoption takes place.

The authorized organizations should also provide prospective adoptive parents with information on how to register their adopted children with the Russian Embassy or local consulate in the United States and other post-placement reporting required by Russian law. Prospective adoptive parents will be expected to register their adopted children as soon as possible after bringing them to the United States and to work with their adoption agencies to comply with the post-placement reporting requirements.

Pre-approval process

Russia may require that cases involving Russian children being adopted by U.S. prospective adoptive parents undergo a "pre-approval" step with USCIS after the match but before the Russian adoption process is completed. To implement this pre-approval process, the prospective adoptive parents will file their Form I-600, *Petition to Classify an Orphan as an Immediate Relative*, before completing the adoption procedures in Russia. Russian authorities will provide all available medical and psycho-social information about the child at this stage in the process, thereby enabling USCIS to review the family's suitability and eligibility determination in light of the child's particular needs. Before issuing pre-approval, USCIS will work with the adoption agencies and the prospective adoptive families in an effort to ensure that the family is fully aware of the child's situation and has completed appropriate training and preparation.

Q: How will the Agreement affect U.S. adoption agencies' ability to work in Russia?

This Agreement will add no additional authorization requirements under U.S. domestic law. However, under the Agreement, only adoption agencies that are specifically authorized by Russia will be permitted to provide services in adoptions to or from Russia. The Department has agreed to provide the Russian Ministry of Education with the list of U.S. adoption service providers accredited or approved in the United States to provide services under The Hague Convention. The Ministry may, at its discretion, decide to grant requests for authorization only to U.S. adoption service providers who have obtained such accreditation or approval, and may not necessarily authorize all of the organizations on the list provided.

Russian authorization of adoption organizations

Adoption agencies must apply to the Russian Ministry of Education and meet the criteria established by Russia to be authorized to operate in Russia. The U.S. Department of State will publish the specific authorization criteria on www.adoption.state.gov once they become available. Adoption service providers will have 60 days following the Agreement's entry into

force to submit the required information in order to continue to provide services in adoptions from Russia. The Ministry must make a decision about an adoption service provider's continued authorization in Russia within 30 days of receiving the required information.

Adoption service providers seeking authorization to operate in Russia for the first time will be able to submit an application at any point after the Agreement's entry into force. The Ministry must make a decision about the new provider's authorization request within 60 days of receiving the application.

Adoption service providers that do not meet the selection deadline

The Ministry has confirmed that any adoption agencies currently operating in Russia that do not submit the required documentation for authorization under the Agreement within the required 60-day timeframe after the Agreement's entry into force will be allowed to apply for re-authorization after one year.

Q: Does the Agreement impose any new or more stringent responsibilities on adoption agencies?

Adoption service providers authorized to operate in Russia will need to meet requirements established by the Russian Ministry of Education or by Russian law in order to obtain and retain authorization to provide services in intercountry adoptions from Russia. The Agreement lays out several new or expanded requirements for receiving and maintaining authorization that may be imposed on adoption service providers. Adoption service providers may be required to submit documentation assuring that they will comply with certain requirements including the following:

Post-adoption requirements

- To inform prospective adoptive parents of Russia's adoption procedures and post-adoption reporting requirements. If the authorized organization assists with a subsequent dissolution and/or placement of a child with another family, the authorized organization must also inform the new prospective adoptive parents of the Russian procedures and post-adoption reporting requirements.
- To monitor the living conditions and upbringing of adopted children as instructed by Russia. The monitoring would have to be carried out at the family's home by the authorized organization's social worker, or by another social worker or organization licensed to evaluate the home.
- To provide periodic reports following an intercountry adoption to the Russian authorities. The reports would have to contain reliable information about the child's psychological and physical development and adaptation to his/her new life.
- To confirm an adopted child's lawful entry into the United States and the child's acquisition of U.S. citizenship.

Adoption disruption and dissolution requirements

- To notify Russian authorities and the U.S. Department of State's Office of Children's Issues as soon as reasonably possible if a case in which it provided services (even cases facilitated before the Agreement entered into force) is pending dissolution or has dissolved. The notification may need to include information on any proposed placement or new adoptive family, the expected (or completed) timeframe for the U.S. court's decision (or any decisions reached by the U.S. court). At the same time, for cases still pending a court decision, the authorized organization may be required to request the consent or non-consent of the Russian authorities to the proposed re-adoption, and if a statement is provided by the Russian authorities before the re-adoption decision is made

by the court, present the Russian consent or non-consent information to the court for its consideration.

Authorized organization requirements

- To notify the Russian authorities and transfer any pending cases or post-adoption reporting responsibilities to another authorized organization in the event that an authorized organization chooses to cease operating in Russia.

Q: What if my case started before entry into force?

Prospective adoptive parent(s) initiating an adoption prior to the Agreement's entry into force will be able to complete the process under the current (pre-Agreement) procedures. Cases will be considered initiated if the prospective adoptive parents have registered their documents to adopt in Russia prior to entry into force.

Q: Is any part of the Agreement effective retroactively?

The Agreement does not apply retroactively. Under the Agreement, Russia may impose requirements on adoption agencies regarding the disruption or dissolution of an adoption that took place prior to entry into force of the Agreement. For example, an authorized organization may be required to report a disruption or dissolution as soon as reasonably possible after it discovers that a case may, or has, been terminated, regardless of when the intercountry adoption was completed.

* * * *

b. Report on Intercountry Adoption

On November 18, 2011, the State Department released its Annual Adoption Report to Congress. A November 18 State Department media note announcing the release of the report is excerpted below, and available at www.state.gov/r/pa/prs/ps/2011/11/177348.htm.

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The Department of State is pleased to announce the release of the 2011 Annual Adoption Report to Congress, which coincides with National Adoption Month. This year, we welcomed Kazakhstan and Ireland as new parties to the Hague Adoption Convention. The Convention provides the best framework for ethical, transparent intercountry adoptions and ensures that adoptions are conducted in the best interest of children.

In fiscal year 2011, the Department of State issued more than 9,300 immigrant visas to children adopted by U.S. citizen parents. More than 2,700 of these immigrant visas were issued under the Hague Adoption Convention.

The Secretary's Special Advisor for International Children's Issues, Ambassador Susan Jacobs, has traveled to more than 15 countries this year, most recently to Guatemala, Kyrgyzstan, Kazakhstan, and Ethiopia, to promote ethical intercountry adoptions and the Hague Adoption Convention. The Department recognizes that intercountry adoption can provide a permanent home to a child who would otherwise be without a family. At the same time, the Department continues to support strong safeguards to prevent the abduction or exploitation of children for the

purpose of adoption.

The Bureau of Consular Affairs Office of Children's Issues prepared this annual report for Congress in compliance with the Intercountry Adoption Act of 2000. The 2011 report can be viewed online at adoption.state.gov. ...

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2. Abduction: 2011 Hague Abduction Convention Compliance Report

In April 2011, the Department of State submitted to Congress its Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") pursuant to 42 U.S.C. § 11611. The report evaluated compliance by treaty partner countries with the Convention. The Convention provides a legal framework for securing the prompt return of wrongfully removed or retained children to the country of their habitual residence where a competent court can make decisions on issues of custody and the child's "best interests." The compliance report identifies the Department's concerns about those countries in which implementation of the Convention is incomplete or in which a particular country's executive, judicial, or law enforcement authorities do not appropriately undertake their obligations under the Convention. The 2011 report, covering the period October 1, 2009, through December 31, 2010, identified St. Kitts and Nevis as "Not Compliant with the Convention" and named Bermuda, Brazil, Bulgaria, Burkina Faso, Honduras, Mexico, and the Bahamas as states demonstrating "Patterns of Noncompliance." The report is available at <http://travel.state.gov/pdf/2011HagueComplianceReport.pdf>.

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Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**

Protecting power agreement in Libya, **Chapter 9.A.**

Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. U.S.-Bermuda Mutual Legal Assistance Agreement

On September 26, 2011, the Senate provided its advice and consent to ratification of the Treaty between the Government of the United States of America and the Government of Bermuda relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009. S. Treaty Doc. No. 111-6 (2010). The Senate provided its advice and consent subject to a declaration that the treaty is “self executing.” 157 Cong. Rec. S5339 (Sept. 6, 2011).^{*} See *Digest 2010* at 38-39 for background on the treaty and its similarities to other mutual legal assistance treaties (“MLATs”).

2. Criminal Case Implicating the U.S. Extradition Treaty with Thailand

See discussion of *United States v. Siriwan*, in section B.4.d., *infra*.

3. Extradition of Fugitive Alleging Fear of Torture

On February 28, 2011, the U.S. Court of Appeals for the Ninth Circuit granted the government’s petition for rehearing en banc of an appeal from the district court’s 2009 grant of habeas corpus relief in *Trinidad y Garcia v. Benov*. 636 F.3d 1174 (9th Cir. 2011). Trinidad argued that his extradition to the Philippines would violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”). For previous developments in the case, see *Digest 2008* at 57–64, *Digest 2009* at 50–51, and *Digest 2010* at 45-49. The United States filed its en banc brief in the Court of Appeals for the Ninth Circuit on April 1, 2011, arguing that the Secretary of State’s determination to extradite was not justiciable. The U.S. brief, excerpted below (with footnotes and citations to the record in the case omitted), is available in full at www.state.gov/s/l/c8183.htm.

* * * *

There should be no doubt that, in light of the Torture Convention and its implementation through the FARR Act [the Foreign Affairs Reform and Restructuring Act of 1988] and State Department regulations, the Secretary of State will not surrender a fugitive for extradition if torture is more

^{*} Editor’s note: The treaty entered into force April 12, 2012.

likely than not to occur in the receiving state. We are thus *not* arguing that the Secretary has the discretion to surrender a fugitive who likely will be tortured, even if particular foreign policy interests at the time might be served.

This case is therefore not about whether the United States may surrender someone for extradition when it believes he is more likely than not to be tortured; it may not do so. Rather, this case is about whether, where appropriate policies and procedures are in place and the Secretary has followed them in determining that a [particular] fugitive is not likely to be tortured, courts may not inquire into that decision—a decision that often depends on complex, delicate, and confidential judgments concerning the state of affairs in foreign countries and multiple foreign relations considerations.

For these very reasons, this Court has held in the past that the Rule of Non-Inquiry governs even when humanitarian claims are raised in attempts to stop extraditions. These precedents have not been overruled by Congress through the FARR Act or the REAL ID Act. To the contrary, Congress' enactments since the United States ratified the Torture Convention have reaffirmed that the Rule of Non-Inquiry governs attempts to attack in the courts the Secretary's extradition surrender determinations.

A contrary ruling that allowed judicial review of extradition surrender determinations made by the Secretary of State would impose a substantial cost. There is a significant public interest in ensuring that the United States abides by its own extradition treaty obligations so that these treaties can be effectively implemented. Thus, in denying a stay of extradition in another case, this Court explained that “the public interest will be served by the United States complying with a valid extradition application * * * under the treaty,” because such compliance “promotes relations between the two countries, and enhances efforts to establish an international rule of law and order.” *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986).

A timely extradition process is a necessary aspect of a functioning extradition relationship between two nations. Excessive delay can jeopardize a foreign prosecution and undercut the core objective of extradition relationships to ensure that fugitives are brought to justice in the country in which their criminal conduct occurred. The United States can reasonably expect foreign governments to honor their extradition obligations to the United States only if it also honors its own such obligations.

Trinidad is accused of a serious, but straightforward, kidnapping offense in a Philippine court, yet the extradition process here has been pending for more than four years. It is therefore important that his extradition be carried out promptly, and all the more so given that the Secretary has concluded that Trinidad can be extradited consistent with the Torture Convention and U.S. law. If a relatively uncomplicated extradition request like this one becomes bogged down in U.S. courts for such a lengthy period, it will become apparent to our treaty partners that more complex requests may be futile or become so entangled in the courts that they become moot before the extradition can be carried out.

Such mootness has occurred twice recently with regard to extraditions that were severely delayed by litigation involving Torture Convention claims. This is what happened in *Cornejo* where an extradition to face murder charges in Mexico was mooted because the U.S. extradition proceedings took so long that the prosecution of the underlying criminal charges became time-barred in Mexico. See *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004). And in *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (2008), the U.S. extradition proceedings took so long that the entire possible Romanian sentence for the

fugitive had expired before judicial review was completed and the case became moot, so that the Supreme Court granted the parties' request to dismiss the petition for certiorari.

Most recently, in another extradition proceeding in this Circuit, the Government was able to complete an extradition to Thailand, despite the existence of Torture Convention claim, only because the district court ruled that the fugitive had not made a sufficient showing of likely torture, and this Court denied a request to enjoin the surrender pending appeal. See *Prasoprat v. Benov*, No. 09-56067 (9th Cir. March 10, 2010) (order denying stay of extradition). Even in that circumstance, the extradition took approximately nine years to effectuate.

These problems in the extradition process will be compounded if a fugitive can extend an already protracted and multi-layered extradition process by triggering a new round of judicial review following any decision by the Secretary involving torture risk allegations. Foreign governments will increasingly conclude that the U.S. court system renders the United States essentially incapable of complying in a timely and meaningful way with its extradition treaty obligations. The interest and ability of the United States to obtain reciprocal cooperation by its treaty partners would thereby be seriously and irreparably damaged by such a ruling.

ARGUMENT

Under The REAL ID Act And The Rule Of Non-Inquiry, Trinidad's Challenge To The Determination By The Secretary Of State To Surrender Him For Extradition To The Philippines Is Not Justiciable.

A. The REAL ID Act Precludes Judicial Review of Torture Convention Claims in the Habeas Context.

1. The REAL ID Act (8 U.S.C. § 1252(a)(4)) requires dismissal of Trinidad's habeas petition attacking the Secretary's extradition surrender determination. Section 1252(a)(4) unambiguously provides that "the *sole* and *exclusive* means for judicial review of *any* cause or claim under the [Torture Convention]" is the filing in a court of appeals of a petition for review challenging a final order of removal under the immigration laws (emphasis added). See 8 U.S.C. 1252(a)(1) (providing review of a "final 8 order of removal").

Congress could not have used more explicit terms to provide that a claim under the Torture Convention is susceptible of judicial review only in a single circumstance. Because the sole circumstance where review of a Torture Convention claim is available is in the context of a final order of immigration removal, the language of the REAL ID Act necessarily precludes Administrative Procedure Act review of a Torture Convention claim under habeas law in connection with an extradition surrender decision. And, there can be no question that Trinidad's claim here arises under the Torture Convention.

The REAL ID Act limitation on jurisdiction over Torture Convention claims exists notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." 8 U.S.C. 1254(a)(4). By using this language, Congress intended to supersede any potentially conflicting law. See *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section").

Congress also explicitly provided that the REAL ID Act superseded statutory *and nonstatutory* law, and it therefore preempts contrary judicial decisions – including [*Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) ("*Cornejo I*") and any other decision allowing for habeas jurisdiction over Torture Convention claims outside the specified context of a final order of removal.

* * * *

2. The district court here, relying on the magistrate judge's recommendation, nevertheless found the plain text of the REAL ID Act inapplicable because the court detected no indication that the statute was meant to govern in the extradition context. The district court cited language in the statute and its legislative history to show that Congress' focus when passing this statute was on immigration order review issues. But the district court's lengthy discussion of the legislative background of the REAL ID Act merely reveals that Congress was spurred to act specifically by concerns about avenues of judicial relief over Torture Convention claims in the immigration context, and that through Section 1252(a)(4) it was making some types of Torture Convention claims enforceable in U.S. courts in certain immigration proceedings.

The district court did not cite any evidence that the unequivocal statutory text narrowly allowing judicial review of Torture Convention claims only in the context of a final order of removal was, contrary to its plain terms, meant to allow enforcement of Torture Convention-based claims in other types of habeas proceedings, such as in the extradition context. The district court therefore had no justification for disregarding the plain statutory text.

3. The text of the REAL ID Act squares with the fact that Article 3 of the Torture Convention is not self-executing, and therefore, in the absence of implementing legislation, creates no judicially enforceable rights in the context of extradition. The U.S. Senate expressly conditioned its advice and consent to ratification of the Torture Convention on a declaration that Articles 1 through 16 of the Convention are "not self-executing," 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); see also S. Exec. Rep. No. 101-30, at 31 (1990). Indeed, the Executive Branch explained in a statement that was included in the Senate's report on the Torture Convention that because these treaty provisions are not self-executing, extradition determinations by the Executive Branch "will not be subject to judicial review in domestic courts." S. Exec. Rep. No. 101-30, at 17-18.

The Supreme Court has made clear that a non-self-executing treaty such as the Torture Convention does not confer judicially enforceable rights upon a private party. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (a non self-executing treaty does not create obligations directly enforceable by private parties in the federal courts, even when, by its terms, that treaty protects individual civil rights); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect").

* * * *

4. The language of the REAL ID Act refutes the rationale of the panel majority in *Cornejo I*, which stated hypothetically that there would be review of extradition surrender decisions by the Secretary of State concerning Torture Convention claims. That view was based on the notion that the Torture Convention and the FARR Act [the Foreign Affairs Reform and Restructuring Act of 1988, 8 U.S.C. § 1231 note, enacted to carry out the Torture Convention] set a standard by which the courts could judge extradition determinations by the Secretary of State in a habeas action, utilizing the review mechanism of the Administrative Procedure Act. See *Cornejo I*, 218 F.3d at 1013-17. But Section 1252(a)(4) of the REAL ID Act makes clear

that there is no jurisdiction over Torture Convention-based claims under the habeas statute or any other, except in specified instances of final orders of removal.

Trinidad has previously asserted that the habeas statute nevertheless provides a mechanism for judicial enforcement of non-self-executing treaty provisions. This Court's sister Circuits have rejected the proposition that non-self-executing treaty provisions can be enforced in the courts through habeas relief. See *Poindexter v. Nash*, 333 F.3d 372, 379 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wesson v. U.S. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002); *United States ex rel. Perez v. Warden*, 286 F.3d 1059, 1063 (8th Cir. 2002). That consensus is correct because non-self-executing treaty provisions can be enforced through the courts only if Congress has taken explicit action to make them enforceable through judicial actions by private parties.

* * * *

5. Trinidad has also previously argued that Section 1252(a)(4) of the REAL ID Act should not be read to 'eliminate' habeas jurisdiction to review extradition surrender decisions because Congress did not make such an intent sufficiently clear, and because Congress did not provide an adequate substitute for habeas relief. There are several problems with these arguments.

First, Congress did not eliminate existing habeas jurisdiction in the REAL ID Act – no habeas review of extradition surrender decisions was available in the first place. ...[T]his Court and its sister Circuits have for years applied the Rule of Non-Inquiry, under which the courts will not review extradition surrender decisions by the Secretary of State. See, e.g., *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997); *United States v. Kin-Hong*, 110 F.3d 103 (1st Cir. 1997). Thus, long before the REAL ID Act, this Court had determined, based on constitutional principles, that there was no habeas right to have a court overturn the Secretary's extradition surrender determinations.

Second, the *Cornejo I* panel majority opined only that the Torture Convention and the FARR Act had for the first time provided a legal standard by which a court could review an extradition surrender decision under the Administrative Procedure Act. The *Cornejo I* panel majority did not create a habeas right that had not existed before; the courts do not create statutory habeas rights. And, Congress in the FARR Act also did not create any habeas rights for extradition fugitives—to the contrary, the plain language of Section 2242(d) of that statute states unequivocally that the FARR Act was *not* providing any jurisdiction for a Torture Convention claim to be heard in court except in the immigration removal context. See 8 U.S.C. § 1231 note. Similarly, as shown earlier, the relevant articles of the Torture Convention are not self-executing, and thus did not create any habeas rights enforceable in U.S. courts. See *Cornejo I*, 218 F.3d at 1017 (Kozinski, J., concurring).

Thus, as the many decisions applying the Rule of Non-Inquiry established, no habeas right to obtain judicial review of an extradition surrender decision by the Secretary of State existed, and no such right was created by the Torture Convention or the FARR Act. Accordingly, nothing in the REAL ID Act could be said to have taken away an existing habeas right, given that no such right existed in the first place.

This Court need go no further in its analysis—the REAL ID Act requires dismissal of Trinidad's petition.

B. The Principles Applied by the Supreme Court in *Munaf* Reinforce the Rule of Non-Inquiry and Preclude Judicial Review of the Secretary of State's Determination to Surrender Trinidad for Extradition.

Even aside from the limiting language of the REAL ID Act, the principles recently enunciated by the Supreme Court in [*Munaf v. Geren*, 553 U.S. 674(2008)] reinforce the longstanding Rule of Non-Inquiry, which precludes judicial review of the Secretary of State's extradition surrender decisions.

This Court has recognized that once a judicial officer has properly determined that a fugitive is extraditable under the relevant treaty and the applicable U.S. law, the process moves into the foreign affairs arena, and authority over surrender rests entirely with the Executive Branch. [*Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005).] at 1016-17. At that stage, the Secretary of State exercises her responsibility to determine whether, and under what circumstances, a fugitive should be surrendered for extradition to the requesting country. *Prasoprat*, 421 F.3d at 1012; *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir.1997)] at 1326. The statutory commitment of this decision to the Secretary reflects a recognition that her determination necessarily involves the application of particular expertise that is not available in the Judiciary, and sensitive foreign relations considerations that are not amenable to judicial review.

In *Munaf* the Supreme Court held that, because the case involved U.S. citizen detainees, the courts had habeas jurisdiction to review a decision by the Executive to surrender two U.S. citizens to Iraqi authorities in order to face criminal charges in Iraqi courts. The Supreme Court nevertheless determined that equitable habeas principles governed and made judicial interference with the Executive's planned action legally inappropriate in light of the United States' firm policy against transferring any person to torture. The petitioners countered that these normal principles were trumped because their transfer to Iraqi custody was likely to result in torture. See 553 U.S. at 700.

Although allegations of likely torture were "of course a matter of serious concern" to the Supreme Court, the Court unequivocally ruled that this "concern is to be addressed by the political branches, not the judiciary," citing the basic principle behind the Rule of Non-Inquiry (*ibid*). The *Munaf* Court recognized that the Executive may "decline to surrender a detainee for many reasons, including humanitarian ones" (553 U.S. at 702). Significantly, the *Munaf* Court noted the Executive's policy not to transfer a detainee where torture is likely to follow and, like the instant case, *Munaf* did not involve a situation in which the Executive had determined that torture would be likely. *Ibid*.

Under these circumstances, the Supreme Court instructed that, while "the Judiciary is not suited to second-guess such determinations, * * * the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." 553 U.S. at 702. The Court recognized that the political branches possess significant diplomatic tools and leverage the judiciary lacks." *Ibid*.

* * * *

Munaf establishes that the principles animating the Rule of Non-Inquiry govern fully in a case like this one in which Trinidad asks the courts to review an extradition surrender determination by the Secretary of State that rejected allegations of likely torture in a receiving state. ...

Just as in *Munaf*, judicial review of the Secretary's extradition surrender determinations would place this Court in an obviously inappropriate position. For example, suppose the Secretary had determined in a particular case that, despite a history of human rights abuses in that country, a fugitive would not be tortured. On that basis, and with appropriate provision for monitoring, she then concludes, consistent with the FARR Act and the Torture Convention, that it is *not* more likely than not that the fugitive would be tortured. A court could evaluate that decision only by second-guessing the expert opinion of the Department of State. It is difficult to contemplate how judges would reliably make such a prediction, lacking any ability to communicate with the foreign government or to weigh the situation there, including the bilateral relationship with the United States, with resources and expertise comparable to those of the Department of State. See *Munaf*, 553 U.S. at 70-03.

Only the Secretary of State has the diplomatic tools at her disposal to best protect a fugitive or ensure humane treatment upon his extradition. See *Munaf*, 553 U.S. at 702-03; *Kin-Hong*, 110 F.3d at 110. The Secretary may decide to attach conditions to the surrender of the fugitive, such as a demand that the requesting country provide assurances regarding the individual's treatment. See *Munaf*, 553 U.S. at 702 (noting Solicitor General's explanation that determinations regarding torture are based on the Executive's ability to obtain foreign assurances it considers reliable); *Jimenez v. United States District Court*, 84 S. Ct. 14, 19 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers). But even the decision to demand such assurances from a foreign state can raise delicate foreign relations issues.

Application of the Rule of Non-Inquiry here makes sense in light of the factors involved in extradition surrender determinations, the inherent limits on the ability of courts to adjudicate issues intimately tied to foreign relations, and the fact that the Department of State has put into place appropriate policies and procedures for determining whether a fugitive is more likely than not to be tortured.

The Secretary of State already has the responsibility to ensure that extraditions are legally carried out. In other words, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Kin-Hong*, 110 F.3d at 111; see *Munaf*, 553 U.S. at 702. Trinidad's argument wrongly assumes that the Secretary will seek to extradite someone to face torture, but the courts have long recognized the presumption that the decisions of government officials are made in good faith. *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926); see also *Jennings v. Mansfield*, 509 F.3d 1362, 1367 (Fed. Cir. 2007). In the present case, the procedures established by the Secretary render such a presumption particularly appropriate.

In sum, in *Lopez-Smith*, this Court reaffirmed the Rule of Non-Inquiry, and refused to grant a habeas writ to stop an extradition despite the petitioner's contention that the legal procedures and punishment he faced in Mexico after extradition were "antipathetic" to the Court's "sense of decency." 121 F.3d at 1326. The Court here should again reaffirm the Rule of Non-Inquiry and reverse the grant of the habeas writ on those grounds.

C. Neither the Torture Convention Nor the FARR Act Overturned the Rule of Non-Inquiry so as to Provide for Judicial Review of the Secretary's Surrender Determinations.

The *Cornejo I* panel majority cited the holding from *Lopez-Smith* to the effect that no judicial review of the Secretary of State's extradition surrender order is available. See 218 F.3d

at 1010. Nevertheless, the panel opined that the FARR Act made the Secretary's extradition surrender decisions justiciable because that statute placed a nondiscretionary duty on the Secretary not to extradite fugitives if she finds it is more likely than not that they will be tortured. *Cornejo I*, 218 F.3d at 1014. In fact, no such justiciability rule can be based on the FARR Act.

1. Trinidad has contended that Article 3 of the Torture Act prohibits the extradition of a person who more likely than not will be tortured, and that the FARR Act creates a duty on the part of the Secretary of State to implement that prohibition. While these contentions are correct, neither of those instruments makes justiciable the Secretary's surrender determination which is exclusively within the province of the Secretary of State.

The text of the FARR Act contradicts any notion that Congress intended to radically alter the law and abruptly create judicial review of extradition surrender determinations by the Secretary of State. To the contrary, as described earlier, the FARR Act states that "[n]otwithstanding any other provision of law * * * nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Torture Convention] or this section * * * except as part of the review of a final order of removal [in immigration cases]." 8 U.S.C. 1231 note, Sec. 2242(d).

This clear statutory text establishes that Congress did not override the Rule of Non-Inquiry and surreptitiously through the FARR Act make extradition surrender decisions justiciable. See also H.R. Conf. Rep. No.105-432, at 150 (1998) ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"). Rather, the FARR Act provided for jurisdiction over claims under the Torture Convention only in review of final immigration removal orders. See *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 194 (D.D.C. 2005). No such removal order is at issue here.

In view of the clear statutory wording of the FARR Act, the dictum in *Cornejo I* that this language only "prohibits courts from reading an implied cause of action into the statute" (218 F.3d at 1015) is mistaken. The FARR Act language manifestly provides that the statute creates no jurisdiction for judicial review of an extradition surrender determination by the Secretary of State.

* * * *

In addition, the regulations promulgated by the Department of State under the express authority of the FARR Act firmly support the proposition that nothing in that statute established a new right to judicial review of extradition surrender determinations. On their face, the regulations indicate that there is no judicial review of the Secretary's extradition surrender decisions. See 22 C.F.R. 95.4 ("[N]otwithstanding any other provision of law * * * nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings").

Especially in light of Congress's explicit delegation to the Secretary of State the authority to "implement" the obligations of the United States under the Torture Convention, these State Department regulations deserve substantial deference as published agency interpretations of the FARR Act. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where there has been a Congressional delegation of administrative authority, courts must defer to reasonable agency interpretation).

The language of the FARR Act and the State Department implementing regulations demonstrate that the FARR Act did not suddenly and silently make justiciable the extradition surrender determinations by the Secretary, contrary to the longstanding Rule of Non-Inquiry.

* * * *

4. Extradition of fugitive alleging failure to comply with requirements of extradition treaty

On December 20, 2011, the U.S. Court of Appeals for the Second Circuit reversed the district court's grant of habeas relief to a Greek fugitive whom the U.S. government sought to extradite to face charges as an accessory to homicide in Greece. *Skaftouros v. United States*, 667 F.3d 144 (2d. Cir. 2011). Skaftouros successfully challenged his extradition in the district court based on purported failures to comply with requirements of the Extradition Treaty between the United States and Greece ("the Treaty"). First, he claimed that the arrest warrant issued in Greece was not valid because it had not been signed by the clerk of the court there. Second, he claimed that the applicable statute of limitations had expired.

The Court of Appeals held that the district court had improperly placed the burden of proof on the government to prove compliance with the extradition treaty and had further erred in engaging in an analysis of the foreign country's laws and procedures beyond what was needed to ensure compliance with the extradition treaty. With the proper allocation of burden and inquiry, the Court concluded that the arrest warrant was valid under the Treaty and the statute of limitations had not run. The Court reversed and remanded, directing the district court to order extradition.

The Court also explained that the district court's error was based in part on a misreading of another Second Circuit decision that was issued while the Skaftouros habeas petition was under review, *Sacirbey v. Guccione*, 589 F.3d 52 (2d Cir.2009). In that case, the Second Circuit held that the arrest warrant of the fugitive was invalid under the extradition treaty because the court in Bosnia that had issued it had been dissolved and no new warrant had been issued. The Court in *Skaftouros* explained that the circumstances in *Sacirbey* were extraordinary and distinguishable from those in *Skaftouros*.

The Second Circuit's opinion is excerpted below with footnotes and the discussion of the background in the case omitted.

* * * *

B. The District Court Erred in Granting Skaftouros's Habeas Petition

...[W]e hold that the District Court erred in granting Skaftouros's petition for a writ of habeas corpus. The District Court's primary error was in imposing the burden of proof on the Government to show that the requirements of Greek law had been met. As a result of this underlying error, the District Court wrongly concluded that Greece had not produced a valid arrest warrant and that the statute of limitations had expired. We address each error in turn.

1. The District Court Erred in Imposing the Burden of Proof on the Government

It is apparent from the opinion under review that the District Court placed the burden of

proof on the Government in the habeas proceeding. With respect to the statute of limitations issue, this placement was explicit: “Although the Government need not prove beyond a reasonable doubt that the statute of limitations has not run in an extradition proceeding, [t]he internally inconsistent documents submitted without sufficient explanation do not serve to meet even the Government’s lesser burden of proof on the statute of limitations issue.” *Skaftouros II*, 759 F.Supp.2d at 360–61. Although the District Court did not expressly place the burden of proof on the Government with respect to the issue of whether Greece had satisfied the Treaty’s requirement of a “duly authenticated warrant,” it interpreted our opinion in *Sacirbey* to “obligate [] the Government to prove the existence of a ‘valid arrest warrant’ ” in order to defeat the habeas petition. *Skaftouros II*, 759 F.Supp.2d at 358 (quoting *Sacirbey*, 589 F.3d at 67 (emphasis in *Skaftouros II*)). We hold that it was error for the District Court to effectively impose on the Government the burden of proving that Skaftouros was *not* “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3).

Habeas corpus, it is well known, “is not a neutral proceeding in which the petitioner and the State stand on an equal footing. Rather, it is an asymmetrical enterprise in which a prisoner seeks to overturn a presumptively valid judgment....” *Pinkney v. Keane*, 920 F.2d 1090, 1094 (2d Cir.1990) (construing 28 U.S.C. § 2254); *see also Fernandez*, 268 U.S. at 312, 45 S.Ct. 541 (habeas corpus “is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing....”). Because we accord a presumption of validity to a judgment on collateral review, it is the petitioner who bears the burden of proving that he is being held contrary to law; and because the habeas proceeding is civil in nature, the petitioner must satisfy his burden of proof by a preponderance of the evidence. *Parke v. Raley*, 506 U.S. 20, 31, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) (“Our precedents make clear ... [that] the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the [petitioner].”); *Walker v. Johnston*, 312 U.S. 275, 286, 61 S.Ct. 574, 85 L.Ed. 830 (1941) (“On a hearing [the § 2241 petitioner has] the burden of sustaining his allegations by a preponderance of evidence.”).

Although we are not aware of any specific authority on the subject, we see no reason why the general habeas corpus standard of proof would not apply to habeas petitions arising from international extradition proceedings. As the Supreme Court held in a case construing the interstate extradition statute, 18 U.S.C. § 3181, “[p]rima facie[, the petitioner is] in lawful custody and upon him rest[s] the burden of overcoming this presumption by proof.” *South Carolina v. Bailey*, 289 U.S. 412, 417, 53 S.Ct. 667, 77 L.Ed. 1292 (1933). Similarly, collateral review of an international extradition order should begin with the presumption that both the order and the related custody of the fugitive are lawful.

We therefore hold that, in order to merit habeas relief in a proceeding seeking collateral review of an extradition order, the petitioner must prove by a preponderance of the evidence that he is “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3), which, in this context, will typically mean in violation of the federal extradition statute, 18 U.S.C. § 3184, or the applicable extradition treaty.

This is not to say that a judge considering a petition for a writ of habeas corpus arising out of an extradition proceeding is expected to wield a rubber stamp. To the contrary, as we observed in *Sacirbey*, despite the narrow scope of habeas review in the extradition context, “[i]t is nevertheless ‘our duty ... to ensur[e] that the applicable provisions of the treaty and the governing American statutes are complied with.’ ” 589 F.3d at 63 (quoting *Petrushansky*, 325 F.2d at 565). However, *Sacirbey* did not impose a general burden of proof the Government in the

context of a habeas proceeding. Although we held that the applicable extradition treaty required the demanding country to “*provide, inter alia*, a valid warrant,” 589 F.3d at 67 (emphasis added), that holding related to the initial extradition proceeding, where the Government, on behalf of the demanding country, does indeed bear the burden of proof. We did not hold that the burden remains with the Government at the habeas stage, after a presumptively valid certificate of extradition has already been issued.

The District Court’s placement of the burden of proof on the Government in this case was error. As explained in more detail below, this error caused the District Court to improperly examine Greece’s compliance with its own law and to determine that certain requirements of the Treaty were not satisfied. These were legal determinations, which we review *de novo*. Upon a review of the record, we conclude that the requirements of the U.S. extradition statute, 18 U.S.C. § 3184, and the Treaty have been satisfied.

2. The Treaty’s Requirement of a “Duly Authenticated” Warrant is Satisfied

Had the burden of proof been properly assigned by the District Court, in order to obtain the writ of habeas corpus, Skaftouros would have been required to prove, by a preponderance of the evidence, that the arrest warrant provided by the Greek government did not satisfy the Treaty’s requirement of a “duly authenticated warrant” sufficient to show that he was “charged” with a crime recognized by the Treaty. Upon a review of the record, we hold that Skaftouros did not, and cannot, carry this burden.

In common with other extradition treaties, the U.S.-Greece Treaty requires that, in cases where a fugitive is “merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced.” Treaty art. XI. Greece fully complied with this requirement by submitting a warrant for Skaftouros’s arrest that was authenticated by the U.S. Ambassador to Greece, along with an indictment demonstrating the existence of probable cause to believe Skaftouros had committed the crime charged. In most cases, the production of an arrest warrant authenticated by the principal diplomatic officer of the United States in the demanding country will suffice to satisfy a treaty’s “duly authenticated warrant” requirement. ... In this case, however, the District Court went further, and imposed on the Government the burden of proving that the arrest warrant was technically valid as a matter of *Greek* law. In so doing, the District Court explained that it relied on our opinion in *Sacirbey*,⁴ and in particular our reference therein to the invalidity of a foreign arrest warrant. But *Sacirbey* was not intended as a break from the previous, well-established authority that the question of whether an arrest warrant is in technical compliance with the law of the demanding country is not to be decided by U.S. courts. Rather, *Sacirbey* stands for the unexceptional proposition that a foreign arrest warrant cannot suffice to show that a fugitive is currently charged with an offense, as required by most extradition treaties, where the court that issued the warrant no longer has the power to enforce it.

Importantly, our analysis in *Sacirbey* was limited to determining whether the requirements of the extradition treaty were met; the majority opinion did not engage questions of Bosnian law. *See* 589 F.3d at 63. Thus, when we stated that “the proof required under the Treaty to establish that an individual has been ‘charged’ with a crime is a valid arrest warrant,” *id.* at 67, we were not referring to validity as a matter of technical compliance with Bosnian criminal procedure, but rather to validity under the applicable treaty. To the extent the language in our opinion in *Sacirbey* has engendered confusion on this point, we now clarify that a “valid arrest warrant” is one that is “duly authenticated” as required by § 3190 and the applicable treaty, and sufficient to show that the fugitive is *currently charged* with an offense recognized by the treaty.

It must, in other words, show that the fugitive is in fact “prosecutab[le]” upon extradition to the demanding country. *See McMullen*, 989 F.2d at 611.

Unlike the arrest warrant in *Sacirbey*, which failed to show that the fugitive was currently charged and prosecutable, the arrest warrant provided by Greece in this case satisfies these requirements. The defects that Skaftouros identifies—namely, that the warrant does not contain the signature of the Clerk or a sufficiently detailed description of his face—are technical in nature, not jurisdictional as in *Sacirbey*. And, as we have stated before, arguments that “savor of technicality” are “peculiarly inappropriate in dealings with a foreign nation.” *Shapiro*, 478 F.2d at 904 (quoting *Bingham*, 241 U.S. at 517, 36 S.Ct. 634 (internal modification removed)).

Skaftouros is, of course, free to raise these technical objections before the courts of Greece, which, we are confident, will be more competent to address them than an American court. Our concern is solely with the requirements of the Treaty and the federal extradition statute. We hold that the arrest warrant satisfies these requirements because it is duly authenticated and shows that Skaftouros is currently charged with an offense recognized by the Treaty, and is therefore prosecutable.

3. The Treaty’s Requirement that the Statute of Limitations on the Charged Offense Not Have Expired is Satisfied

The District Court properly noted that the Treaty does not permit extradition where, “‘from lapse of time or other lawful cause, according to the laws of either of the surrendering country [sic] or the demanding country, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked.’ ” *See Skaftouros II*, 759 F.Supp.2d at 359 (quoting Treaty art. V). Because the Treaty itself requires an examination of whether the statute of limitations of either the demanding or asylum country has expired (and because the United States does not have a statute of limitations for first degree murder...), it was proper for the District Court to examine Greek law for the limited purpose of determining whether its statute of limitations had expired. In so doing, however, the District Court again improperly placed the burden on the Government to prove that the statute of limitations had not run, rather than on Skaftouros to prove that it had.

The parties agreed that the Greek statute of limitations for aggravated murder is ordinarily twenty years. The Government, however, argued that the normal statute of limitations had been extended under Article 113 of the Greek Criminal Code, which states that the statute of limitations may be tolled for up to five years when it is not possible to commence or continue a prosecution. ... In support of this argument, the Government submitted a letter from the Public Prosecutor of the Court of Appeals of Athens stating that the statute of limitations had been so tolled in this case, owing to Skaftouros’s failure to appear to answer the charges against him. In order to show that Skaftouros had been properly served with the indictment, a requirement of Article 113, the Government produced the April 17, 1991, request from the Public Prosecutor that police serve the indictment; the May 6, 1991, confirmation from the police to the Public Prosecutor that the indictment had been served on Skaftouros’s mother; and the October 1991 Order suspending the proceedings, which noted the “legal service” of the indictment on May 5, 1991. In the habeas proceeding, it was Skaftouros’s burden as the petitioner to show that the statute of limitations had not in fact been extended by operation of Article 113 and therefore had expired. This Skaftouros attempted to do by arguing that only the original certificate of service of the indictment would suffice to show that the statute of limitations had been extended. However, Skaftouros offered no authority for this position, save for the unsworn and unsupported assertion of his own lawyer in Greece.

We find that the averment of Skaftouros's Greek counsel was insufficient to satisfy Skaftouros's burden of proving that the statute of limitations had not been extended. The District Court's contrary holding was error, and derived from its improper placement of the burden of proof on the Government. *See Skaftouros II*, 759 F.Supp.2d at 360 (finding that "the Government has not provided adequate proof that the Order extending the statute of limitations was served on Skaftouros or his close relative").

In placing the burden of proof on the Government, the District Court relied on our opinion in *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir.1976). In *Jhirad*, however, our consideration of the question of burdens of proof was limited to whether the demanding country in an extradition proceeding should have to prove beyond a reasonable doubt that the American statute of limitations was tolled by virtue of 18 U.S.C. § 3290, which provides that "[n]o statute of limitations shall extend to any person fleeing from justice." *See Jhirad*, 536 F.2d at 484–85. Noting that the interests served by the beyond-a-reasonable-doubt standard apply "with less force in the context of an international extradition proceeding," we held that India, the demanding country and real party in interest, was only required to prove by a preponderance of the evidence that the statute had been tolled. *Id.* at 484. We did not address the assignment of the burden of proof in a habeas proceeding challenging the legality of an extradition proceeding, but rather the assignment of the burden in the extradition proceeding, itself.

The evidence before the District Court strongly suggested that the statute of limitations had been tolled by virtue of the October 1991 Order. Skaftouros's argument that the October 1991 Order was ineffective because there was insufficient proof that he had been served with the indictment is supported only by the word of his own Greek attorney—an averment lacking any indicia of reliability whatsoever. It is clear to us, therefore, that Skaftouros did not meet his burden of proving, even by a preponderance of the evidence, that the applicable Greek statute of limitations had expired or that Article V of the Treaty had not been satisfied.

* * * *

5. Universal Jurisdiction

On October 18, 2011, Steven Hill, Counselor to the U.S. Mission to the United Nations, delivered remarks on the U.N. General Assembly Sixth (Legal) Committee's session on the scope and application of the principle of universal jurisdiction. Mr. Hill's remarks are excerpted below and are available in full at

<http://usun.state.gov/briefing/statements/2011/177342.htm>.

* * * *

We greatly appreciate the Sixth Committee's continued interest in this important item. We thank the Secretary-General for his report (A/66/93), which is an extremely useful reference on this topic.

The United States has already submitted information and views on universal jurisdiction; those views were included in the Secretary-General's report last year (A/65/181). In the interest of the efficiency of our discussions today, we will only highlight a few of these points.

We supported the decision to consider the scope and application of the principle of

universal jurisdiction in a working group because the topic is an important but complicated one. As we look over the reports of the Secretary-General, it is clear that basic questions remain about universal jurisdiction and the views and practices of states related to the topic. Some questions that might be examined by the working group include the following.

First is the question of definition: what do we mean when we refer to universal jurisdiction? For purposes of this discussion and as detailed in our submission, the United States has understood universal jurisdiction to include assertion of criminal jurisdiction by a State for certain grave offenses, where the only link to the particular crime is the presence in its territory of the alleged offender. However, we know that others have somewhat different views, and we look forward to exploring that in the working group.

The second question relates to the appropriate scope of the principle. That is to say, to what crimes do universal jurisdictions apply?

Other questions include the relationship between universal jurisdiction and treaty-based obligations, as well as the need to ensure that decisions to invoke it are undertaken in an appropriate manner, including in cases where there are other States that may exercise jurisdiction.

We look forward to exploring these issues in as practical a manner as possible. We look forward to participating in the working group.

* * * *

6. Visa Waiver Program Agreements on Preventing and Combating Serious Crime

During 2011, the United States signed bilateral agreements with Belgium, Croatia, Ireland, and Sweden on preventing and combating serious crime. The agreements provide a mechanism for the parties' law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. The agreement with Croatia entered into force in 2011, as did the agreement signed in 2010 with Denmark, the agreement signed in 2009 with Portugal, and the agreements signed in 2008 with Germany and Malta. For background, see *Digest 2008* at 80–83, *Digest 2009* at 66, and *Digest 2010* at 57–58. The agreements with Croatia, Denmark, Germany, and Malta are available at

www.state.gov/documents/organization/179966.pdf,

www.state.gov/documents/organization/169476.pdf,

www.state.gov/documents/organization/169463.pdf,

and www.state.gov/documents/organization/180611.pdf, respectively. As of the end of 2011, the United States continued to negotiate such data-sharing agreements with other members of the Visa Waiver Program, consistent with a federal statute requiring completion of such agreements with all members of the program.

B. INTERNATIONAL CRIMES**1. Terrorism*****a. Country reports on terrorism***

On August 18, 2011, the Department of State released the 2010 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at www.state.gov/j/ct/rls/crt/2010.

b. UN General Assembly

On November 18, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the U.N., addressed the General Assembly at its session to discuss a foiled terrorist plot to assassinate the Ambassador of Saudi Arabia to the United States. In the excerpts below, Ambassador Rice welcomed the resolution condemning terrorism generally and the Iran-supported plot against the Saudi Ambassador in particular. UN Doc. A/RES/66/12. The full text of Ambassador Rice's remarks is available at <http://usun.state.gov/briefing/statements/2011/177393.htm>.

* * * *

I want to begin by congratulating the people of Saudi Arabia for their overwhelming success here in the General Assembly. But I also want to congratulate the member states of the General Assembly, because today—in a very powerful, unified statement of support—they came together to clearly condemn terrorism in all its forms, to deplore the plot to assassinate the Saudi Ambassador to the United States, and to call on Iran to fulfill its obligations under the 1973 convention** and cooperate with this investigation.

I think it's noteworthy that over a 100 countries—a total of 106—voted in favor of this resolution, and only nine opposed it. Nine. Iran plus eight. Not one of those eight countries was another Islamic—predominantly Islamic—or Arab country. Not one.

The world came together in a very strong message that diplomats and the work we do are sacrosanct. We all deserve protection and the ability to do the work of the state without fear or threat of violence.

And today, the members of the General Assembly delivered that message very forcefully. Iran is increasingly isolated here in this body at the United Nations in New York, again, today in Vienna. And I think this is indicative of the world's growing abhorrence of their behavior, including their support for terrorism, their pursuit of a nuclear weapons program and their gross

** Editor's note: The reference is to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 15410.

violations of Human Rights.

* * * *

c. U.S. actions against support for terrorists

(1) U.S. targeted sanctions implementing UN Security Council resolutions

See Chapter 16.A.4.b.

(2) Foreign terrorist organizations

(i) New designations and modifications of existing designations

In 2011 the Department of State announced the Secretary of State's designation of two additional organizations and their associated aliases as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Army of Islam, also known as Jaish al-Islam, also known as Jaysh al-Islam (76 Fed. Reg. 29,812 (May 23, 2011)); and Indian Mujahideen, also known as Indian Mujahideen, also known as Indian Mujahidin, also known as Islamic Security Force—Indian Mujahideen (ISF—IM) (76 Fed. Reg. 58,076 (Sept. 19, 2011)).

U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from, the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a designated FTO. 18 U.S.C. § 2339B. See www.state.gov/j/ct/rls/other/des/123085.htm for background on the applicable sanctions and other legal consequences of designation as an FTO.

(ii) Reviews of FTO designations

During 2011 the Secretary of State continued to review designations of entities as Foreign Terrorist Organizations ("FTOs"), and the Department of State announced the Deputy Secretary's determination that the designation of the following organization as an FTO "shall remain in place:" al-Aqsa Martyrs' Brigade, also known as al-Aqsa Martyrs' Battalion. 76 Fed. Reg. 17,979 (March 31, 2011).

The review was conducted consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

d. Global Counterterrorism Forum

On September 22, 2011, 29 countries and the European Union launched the Global Counterterrorism Forum ("GCTF"). The United States Department of State hosted the inaugural meeting of the GCTF's Criminal Justice/Rule of Law Working Group on November 3-4, 2011. The Criminal Justice/Rule of Law Working Group is co-chaired by the United States and Egypt and is one of five expert-led working groups of the GCTF. A State Department Media note, available at www.state.gov/r/pa/prs/ps/2011/11/176609.htm, described the agenda of the GCTF Working Group and the purpose generally of the GCTF.

* * * *

Attorney General Eric Holder will deliver opening remarks at this meeting, where senior counterterrorism prosecutors and other criminal justice officials from GCTF members will begin to develop a compendium of sound practices for effective counterterrorism practices in the criminal justice system. This is part of the broader GCTF effort to provide support for countries seeking to turn their backs on repressive approaches to counterterrorism and to encourage criminal justice authorities to adopt robust and human rights-compliant counterterrorism policies and practices that protect both the security and liberty of their citizens.

Once this compilation of good practices is finalized, the group will turn its attention to providing or facilitating the training, advising, and supporting other technical assistance to promote their implementation in interested countries, including those in the midst of the Arab Spring.

The GCTF is a major initiative within the Administration's broader effort to build the international architecture for dealing with 21st century terrorism. It provides a unique platform for senior counterterrorism policymakers and experts from around the world to work together to identify urgent needs, devise solutions, and mobilize resources for addressing key counterterrorism challenges. With its primary focus on capacity building in relevant areas, the GCTF aims to increase the number of countries capable of dealing with the terrorist threats within their borders and regions.

* * * *

2. Narcotrafficking

a. *Majors List process*

(1) International Narcotics Control Strategy Report

On March 3, 2011, the Department of State released the 2011 International Narcotics Control Strategy Report (“INCSR”), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of key countries to attack all aspects of the international drug trade in Calendar Year 2010. Volume I covers drug and chemical control activities and Volume II covers money laundering and financial crimes. The report is available at www.state.gov/p/inl/rls/nrcrpt/2011/index.htm.

(2) Major drug transit or illicit drug producing countries

On September 15, 2011, President Obama issued Presidential Determination 2011-16, “Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2012.” Daily Comp. Pres. Docs., 2011 DCPD No. 00640, pp. 1–3. In this annual determination, the President named Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country’s presence on the “Majors List” is not necessarily an adverse reflection of its government’s counternarcotics efforts or level of cooperation with the United States. Belize and El Salvador were added to the list in 2011. The President designated Bolivia, Burma, and Venezuela as countries that have failed demonstrably to adhere to their international obligations in fighting narcotrafficking. Simultaneously, the President determined that “support for programs to aid Bolivia and Venezuela are vital to the national interests of the United States,” thus ensuring that such U.S. assistance would not be restricted during fiscal year 2012 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424. As a result of the President’s designations, Burma remained ineligible during fiscal year 2012 for most types of U.S. assistance.

b. *Interdiction assistance*

During 2011 President Obama again certified, with respect to Colombia (76 Fed. Reg. 53,299 (Aug. 25, 2011)) and Brazil (Daily Comp. Pres. Docs., 2011 DCPD No. 00753, p. 1, Oct. 14, 2011), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country’s airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on

the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

3. Trafficking in Persons

a. *Trafficking in Persons report*

On June 27, 2011, the Department of State released the 2011 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 (“TVPA”), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covered the period April 2010 through March 2011 and evaluated the anti-trafficking efforts of a greater number of countries (184) than in past years, including those of the United States. In her remarks upon the release of the 2011 report, available at www.state.gov/secretary/rm/2011/06/167156.htm, Secretary of State Hillary Rodham Clinton explained:

Every year, we come together to release this report, to take stock of our progress, to make suggestions, and to refine our methods. Today, we are releasing a new report that ranks 184 countries, including our own. One of the innovations when I became Secretary was we were going to also analyze and rank ourselves, because I don’t think it’s fair for us to rank others if we don’t look hard at who we are and what we’re doing. This report is the product of a collaborative process that involves ambassadors and embassies and NGOs as well as our team here in Washington. And it really does give us a snapshot about what’s happening. It shows us where political will and political leadership are making a difference.

* * * *

Now it’s only fair that countries know why they have a certain ranking, and that we, then, take on the responsibility of working with countries to respond. So we are issuing concrete recommendations and providing technical assistance. This week, U.S. diplomats around the world will be meeting with their host country governments to review action plans and provide recommendations when needed. And I’m instructing our embassies and the trafficking office to intensify partnerships in the coming months so that every country that wishes to can improve its standing.

So while this report is encouraging more countries to come to the table, none of us can afford to be satisfied. Just because a so-called developed country has well-established rules, laws, and a strong criminal justice system, does not mean that any of

us are doing everything we can. Even in these tight economic times, we need to look for creative ways to do better. And this goes for the United States, because we are shining a light on ourselves and we intend to do more in order to make our own situation better and help those who are interested in doing the same.

Through the report, the Department designated applicable countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 in relation to their efforts to comply with the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The report listed 23 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at www.state.gov/documents/organization/164452.pdf, and the remarks of Under Secretary of State for Democracy and Global Affairs Maria Otero, and Ambassador-at-Large in the Office to Monitor and Combat Trafficking in Persons Luis CdeBaca, upon the release of the report are available at www.state.gov/q/167166.htm. Chapter 6.C.2.b. discusses the determinations relating to child soldiers.

b. Presidential determination

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to “each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance.” The four determination options are set forth in § 110(d)(1)–(4).

On September 30, 2011, President Obama issued a memorandum for the Secretary of State, “Presidential Determination With Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons.” Presidential Determination No. 2011-18, 76 Fed. Reg. 62,599 (Oct. 11, 2011). The President’s memorandum contained determinations concerning the 23 countries that the 2011 Trafficking in Persons Report listed as Tier 3 countries. The President’s determinations are excerpted below. See Chapter 3.B.3.a. *supra* for discussion of the 2011 report. The Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to “Tier 3” Countries set forth the determinations the President made and their effect; the memorandum also included a separate discussion of each of the named countries. The memorandum of justification is available at www.state.gov/q/tip/rls/other/2011/175577.htm.

* * * *

Consistent with section 110 of the Trafficking Victims Protection Act of 2000 (Division A of

Public Law 106-386), as amended (the “Act”), I hereby:

Make the determination provided in section 110(d)(1)(A)(i) of the Act, with respect to Burma, the Democratic Republic of the Congo, Equatorial Guinea, and Zimbabwe, not to provide certain funding for those countries’ governments for fiscal year 2012, until such governments comply with the minimum standards or make significant efforts to bring themselves into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act;

Make the determination provided in section 110(d)(1)(A)(ii) of the Act, with respect to Cuba, the Democratic People’s Republic of North Korea (DPRK), Eritrea, Iran, Madagascar, and Venezuela, not to provide certain funding for those countries’ governments for fiscal year 2012, until such governments comply with the minimum standards or make significant efforts to bring themselves into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act;

Determine, consistent with section 110(d)(4) of the Act, with respect to Algeria, the Central African Republic, Guinea-Bissau, Kuwait, Lebanon, Libya, Mauritania, Micronesia, Papua New Guinea, Saudi Arabia, Sudan, Turkmenistan, and Yemen that provision to these countries’ governments of all programs, projects, or activities of assistance described in sections 110(d)(1)(A)(i)-(ii) and 110(d)(1)(B) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Burma, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support government labs and offices that work to combat infectious disease and to support government participation in nongovernmental organization-run civil society programs and Association of South East Asian Nations programs addressing vulnerable populations would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Cuba and Venezuela, that a partial waiver to allow funding for educational and cultural exchange programs described in section 110(d)(1)(A)(ii) of the Act that are related to democracy or the rule of law programming would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Iran, that a partial waiver to allow funding for educational and cultural exchange programs described in section 110(d)(1)(A)(ii) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to the Democratic Republic of the Congo, that assistance and programs described in section 110(d)(1)(A)(i) and 110(d)(1)(B) of the Act, with the exception of Foreign Military Sales and Foreign Military Financing, would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Venezuela, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support programs designed to strengthen the democratic process in Venezuela would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Equatorial Guinea, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support programs to study and combat the spread of infectious diseases and to

advance sustainable natural resource management and biodiversity would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Equatorial Guinea, that assistance described in section 110(d)(1)(B) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Zimbabwe, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act for assistance for victims of trafficking in persons or to combat such trafficking, and for programs to support the promotion of health, good governance, education, agriculture and food security, poverty reduction, livelihoods, family planning, and macroeconomic growth including anticorruption, and programs that would have a significant adverse effect on vulnerable populations if suspended, would promote the purposes of the Act or is otherwise in the national interest of the United States;

And determine, consistent with section 110(d)(4) of the Act, with respect to Venezuela and Zimbabwe, that assistance described in section 110(d)(1)(B) of the Act, which:

(1) is a regional program, project, or activity under which the total benefit to Venezuela or Zimbabwe does not exceed 10 percent of the total value of such program, project or activity; or

(2) has as its primary objective the addressing of basic human needs, as defined by the Department of the Treasury with respect to other, existing legislative mandates concerning U.S. participation in the multilateral development banks; or

(3) is complementary to or has similar policy objectives to programs being implemented bilaterally by the United States Government; or

(4) has as its primary objective the improvement of Venezuela or Zimbabwe's legal system, including in areas that impact Venezuela or Zimbabwe's ability to investigate and prosecute trafficking cases or otherwise improve implementation of its anti-trafficking policy, regulations or legislation; or

(5) is engaging a government, international organization, or civil society organization, and seeks as its primary objective(s) to: (a) increase efforts to investigate and prosecute trafficking in persons crimes; (b) increase protection for victims of trafficking through better screening, identification, rescue or removal; aftercare (shelter, counseling) training and reintegration; or (c) expand prevention efforts through education and awareness campaigns highlighting the dangers of trafficking or training and economic empowerment of populations clearly at risk of falling victim to trafficking, would promote the purposes of the Act or is otherwise in the national interest of the United States.

* * * *

4. Money Laundering

a. Iran

See Chapter 16.A.2.b(1)(ii) for discussion of the designation of Iran as a jurisdiction of primary money laundering concern under Section 311 of the USA PATRIOT Act.

b. Lebanese Canadian Bank

On February 17, 2011, the Department of the Treasury, Financial Crimes Enforcement Network (“FinCEN”) issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56 that the Lebanese Canadian Bank SAL (“LCB”) is a financial institution of primary money laundering concern. 76 Fed. Reg. 9403 (Feb. 17, 2011). Based on this finding, FinCEN also issued on the same day a notice of proposed rulemaking under § 311. 76 Fed. Reg. 9268 (Feb. 17, 2011). The rule proposed would impose a “special measure authorized by 31 U.S.C. § 5318A(b)(5). That special measure authorizes the prohibition against the opening or maintaining of correspondent accounts by any domestic financial institution or agency for or on behalf of a targeted financial institution.” Excerpts from the notice of finding below explain the action (with footnotes omitted).

* * * *

B. The Lebanese Canadian Bank SAL

The Lebanese Canadian Bank SAL (“LCB”) is based in Beirut, Lebanon, and maintains a network of 35 branches in Lebanon and a representative office in Montreal, Canada. The bank is eighth largest among Lebanese banks in assets and has over 600 employees. Originally established in 1960 as Banque des Activités Economiques SAL, it operated as a subsidiary of the Royal Bank of Canada Middle East (1968-1988) and is now a privately owned bank. LCB offers a broad range of corporate, retail, and investment products, and maintains extensive correspondent accounts with banks worldwide, including several U.S. financial institutions. As of 2009 LCB’s total assets were worth over \$5 billion.

LCB has a controlling financial interest in a number of subsidiaries, including LCB Investments (Holding) SAL, LCB Finance SAL, LCB Estates SAL, LCB Insurance Brokerage House SAL, and Dubai-based Tabadul for Shares and Bonds LLC. Additionally, LCB is the majority shareholder of Prime Bank Limited, a private commercial bank and the LCB subsidiary located in Serrekunda, Gambia. LCB owns 51% of Prime Bank while the remaining shares are held by local and Lebanese partners. LCB apparently serves as the sole correspondent bank for Prime Bank. For purposes of this document and unless expressly stated otherwise, references to LCB include the aforementioned subsidiaries.

C. Lebanon

Lebanon is a financial hub for banking activities in the Middle East and eastern Mediterranean and has one of the more sophisticated banking sectors in the region. There are 66 banks incorporated in Lebanon, and all major banks have correspondent relationships with U.S. financial institutions. The five largest commercial banks account for roughly 60% of total banking assets, estimated at \$125 billion. According to Treasury information, strong economic growth and a steady flow of diaspora deposits in recent years have helped the Lebanese banking system to maintain relatively robust lending, improve asset quality, and maintain adequate liquidity and capitalization positions. However, banks remain highly exposed to the heavily indebted sovereign, carry significant currency risk on their balance sheets, and operate in a volatile political security environment.

Lebanon also faces money laundering and terrorist financing vulnerabilities, according to the International Narcotics Control Strategy Report (“INCSR”) published in March 2010 by the

U.S. Department of State. Of particular relevance is the possibility that a portion of the substantial flow of remittances from the Lebanese diaspora, estimated at \$7 billion—21% of GDP—in 2009, according to the World Bank, could be associated with underground finance and Trade-Based Money Laundering (“TBML”) activities. Laundered criminal proceeds come primarily from Lebanese criminal activity and organized crime.

Lebanon’s Customs Authority (“Customs”) supervises two free trade zones operating in the country. However, high levels of corruption within Customs create vulnerabilities for TBML and other threats. Moreover, Lebanon has no cross-border currency reporting requirements, resulting in a significant cash-smuggling vulnerability. Finally, Lebanon has not acceded to the UN Convention for the Suppression of the Financing of Terrorism, though it has adopted laws domestically criminalizing any funds resulting from the financing or contribution to the financing of terrorism. However, such laws do not apply to Hizballah, which Lebanon considers to be a legitimate political party and resistance organization, and it is not subject to Lebanese anti-terrorist financing laws. The United States Government (“USG”) designated Hizballah as a Foreign Terrorist Organization on October 8, 1997. Additionally, on October 31, 2001, Hizballah was designated by the USG as a Specially Designated Global Terrorist under Executive Order 13224.

II. Analysis of Factors

Based upon a review and analysis of the administrative record in this matter, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN has determined that LCB is a financial institution of primary money laundering concern. FinCEN has reason to believe that LCB has been routinely used by drug traffickers and money launderers operating in various countries in Central and South America, Europe, Africa, and the Middle East; that Hizballah derived financial support from the criminal activities of this network; and that LCB managers are complicit in the network’s money laundering activities. A discussion of the factors relevant to this finding follows:

1. The Extent to Which LCB Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

The USG has information through law enforcement and other sources indicating that LCB—through management complicity, failure of internal controls, and lack of application of prudent banking standards—has been used extensively by persons associated with international drug trafficking and money laundering. According to this information, this international drug trafficking and money laundering network generally moves illegal drugs from South America to Europe and the Middle East via West Africa, with proceeds laundered through the Lebanese financial system, as well as through TBML involving used cars and consumer goods. Specifically, individuals mentioned below (with the assistance of close family members who are key participants in the global drug trafficking and money laundering network) are known to hold or utilize cash deposit accounts at LCB to move hundreds of millions of dollars monthly in cash proceeds from illicit drug sales into the formal financial system, as well as to coordinate the laundering of these funds through key foreign nodes of the network using LCB accounts. The bank’s involvement in money laundering is attributable to failure to adequately control transactions that are highly vulnerable to criminal exploitation, including cash deposits and cross-border wire transfers, inadequate due diligence on high-risk customers like exchange houses, and, in some cases, complicity in the laundering activity by LCB managers.

For example, in this global narco-money laundering network, U.S.-designated Ayman

Joumaa has coordinated the transportation, distribution, and sale of multi-ton bulk shipments of cocaine from South America, and laundered the proceeds—as much as \$200 million per month—from the sale of cocaine in Europe and the Middle East. In this criminal scheme, the proceeds have been laundered through various methods, including bulk cash smuggling operations and use of several

Lebanese exchange houses that utilize accounts at LCB branches managed by family members of other participants in the global money laundering network. Specifically, Ayman Joumaa deposits bulk cash into multiple exchange houses, including the one that he owns, which then deposit the currency into their LCB accounts. He or the exchange houses then instruct LCB to perform wire transfers in furtherance of one of two TBML schemes. For example, some of the funds move to LCB's U.S. correspondent accounts via suspiciously structured electronic wire transfers to multiple U.S.-based used car dealerships—some of which are operated by individuals who have been separately identified in drug-related investigations. The recipients use the funds to purchase vehicles in the United States, which are then shipped to West Africa and/or other overseas destinations, with the proceeds ultimately repatriated back to Lebanon. Other funds are sent through LCB's U.S. correspondent accounts to pay Asian suppliers of consumer goods, which are shipped to Latin America and sold and the proceeds are laundered through a scheme known as the Black Market Peso Exchange, in each case through other individuals referred to in this finding or via companies owned or controlled by them. According to USG information, Hizballah derived financial support from the criminal activities of Joumaa's network.

With respect to the exchanges and companies related to Ayman Joumaa, numerous instances indicate that substantial amounts of illicit funds may have passed through LCB. Since January 2006, hundreds of records with a cumulative equivalent value of \$66.4 million identified a Lebanese bank that originated the transfer; approximately half of those were originated by LCB, for a cumulative equivalent value of \$66.2 million, or 94%, thus, indicating that LCB probably is the favored bank for these exchange houses, particularly in the context of illicit banking activity. Similarly, a review of all dollar-denominated wire transfers with the two primary exchange houses either as sender or receiver between January 2004 and December 2008 showed 72% originated by one of the exchange houses through LCB.

Individual A, who owns a wide network of companies manufacturing or procuring consumer goods in Asia, Europe, and the Middle East, the Caribbean, and Lebanon, participates in this money laundering scheme by providing the consumer goods that are used for TBML, as described above. Despite his business being based in Asia, he is believed to have centralized his banking operations in Lebanon, particularly through the use of over 30 accounts at LCB. USG information shows Individual A receiving funds in his accounts from Ayman Joumaa, and exchanging funds with Latin American members of the network discussed below. Individual A is known to be in near daily communication with the bank from his professional base in Southeast Asia.

Individual B, based in Latin America, is part of a Lebanese drug trafficking organization that moves large quantities of drugs from Latin America to destinations throughout Africa, Europe, and the Middle East. For over a decade, Individual B and his family have been involved in a variety of TBML schemes with Latin American drug traffickers and Lebanese money launderers. In the criminal schemes, the individuals deposit the local currency proceeds from the sale of imported consumer goods to the accounts of local banks and convert them to hard currency.

This completes the Latin America-based Black Market Peso Exchange money laundering

cycle, and allows for the repatriation of proceeds for the Latin American drug producers. Individual B then uses accounts at LCB to exchange the funds—usually in suspiciously structured amounts—with previously mentioned individuals and other suspected criminals as part of the global money laundering network. Information available to the USG suggests that Individual B and his family members are supporters of Hizballah.

Additionally, USG information indicates that Individual C, connected to both drug trafficking and money laundering, has established a money exchange house in the same building as a key LCB branch. This exchange uses its LCB accounts to deposit bulk cash proceeds of drug sales and then wires the proceeds to U.S.-based used car dealers. Individuals managing this and another LCB branch—each of which houses key accounts accepting bulk cash from exchange houses or wiring funds for the TBML schemes described above—are family members of one of the aforementioned individuals running Asia-based TBML activities.

At least one of these individuals has family relationships and personal contact with key LCB managers, in some cases working directly with those managers to conduct his transactions. The USG has information indicating that a minority owner of the bank, who concurrently serves as General Manager, his deputy, and the managers of key branches are in frequent—in some cases even daily—communication with various members of the aforementioned drug trafficking and money laundering network, and they personally process transactions on the network's behalf. Additionally, LCB managers are linked to Hizballah officials outside Lebanon. For example, Hizballah's Tehran-based envoy Abdallah Safieddine is involved in Iranian officials' access to LCB and key LCB managers, who provide them banking services.

Finally, information available to the U.S. Government indicates that LCB's subsidiary, Gambia-based Prime Bank, is partially owned by a Lebanese individual known to be a supporter of Hizballah. In addition to Gambian nationals, Prime Bank serves Iranian and Lebanese clientele throughout West Africa.

2. The Extent to Which LCB Is Used for Legitimate Business Purposes in the Jurisdiction

LCB is one of 49 mostly private Lebanese banks that make up Lebanon's financial sector. LCB has maintained modest but steady growth since 2000, with total assets of more than \$5 billion in 2009. LCB also appears to be aware of the risk posed by money laundering, as noted in its Anti-Money Laundering Policy Statement. A publicly available source also indicates that U.S. financial institutions maintain correspondent relationships with LCB, and it is likely that a high volume of those transactions through those accounts is legitimate. However, numerous instances have been identified where substantial volumes of illicit funds have passed through LCB. Thus, any legitimate use of LCB is significantly outweighed by the apparent use of LCB to promote or facilitate money laundering.

3. The Extent to Which Such Action Is Sufficient to Ensure, With Respect to Transactions Involving LCB, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

As detailed above, FinCEN has reasonable grounds to conclude that LCB is being used to promote or facilitate money laundering, and is, therefore, an institution of primary money laundering concern. Currently, there are no protective measures that specifically target LCB. Thus, finding LCB to be a financial institution of money laundering concern, which would allow consideration by the Secretary of special measures to be imposed on the institution under Section 311, is a necessary first step to prevent LCB from facilitating money laundering or other financial crime through the U.S. financial system. The finding of primary money laundering concern will bring criminal conduct occurring at or through LCB to the attention of the

international financial community and further limit the bank's ability to be used for money laundering or other criminal purposes.

* * * *

c. *Withdrawal of Finding: VEF Banka*

On August 1, 2011, FinCEN withdrew a finding of primary money laundering concern and repealed the rule imposing a special measure relating to VEF Banka, a bank headquartered in Riga, Latvia. 76 Fed. Reg. 45,689 (Aug. 1, 2011). See *Digest 2006* at 249-52 for discussion of the original finding and notice of proposed rulemaking for VEF Banka. The notice in the Federal Register explained the reasons for FinCEN's action:

On May 26, 2010, VEF Banka's Latvian banking regulator, the Financial and Capital Market Commission (the "FCMC"), revoked VEF Banka's operating license on the grounds that the shareholders of the bank had not received authorization from the FCMC for the acquisition of qualifying holdings and the bank failed to ensure compliance with provisions of the Credit Institution Law. As a result, the shareholders had no decision-making rights and were unable to "ensure prudent bank operations." The FCMC's decision to revoke VEF Banka's license was confirmed by the Senate of Latvia's Supreme Court on July 22, 2010 and terminated VEF Banka's ability to operate as a financial institution under Latvian law. On November 15, 2010, the Riga District Court issued a nonappealable order to begin liquidating the bank. The liquidation process is expected to be complete in one to two years and will result in the disposition of all of VEF Banka's assets, including its subsidiary, Veiksmes lizings.

d. *U.S. prosecution of Thai nationals on money laundering charges*

On September 9, 2011, the United States filed a brief in the U.S. District Court for the Central District of California opposing a motion to dismiss a criminal indictment that included money laundering charges. *United States v. Siriwan*, CR No. 09-81-GW (C.D. Cal.) The indictment, available at www.justice.gov/criminal/fraud/fcpa/cases/siriwan/01-28-09siriwan-indictment.pdf, charged two Thai nationals—a former official in the Thai government's tourism agency and her daughter—on several counts, including transmitting money outside the U.S. for the purpose of carrying on a specified unlawful activity ("SUA"), namely bribery of a foreign official and violation of Thai public corruption law. Indictment ¶ 32. The indictment alleged that defendants made arrangements with U.S. citizens Gerald and Patricia Green ("the Greens") to receive bribes in exchange for awarding tourism-related contracts. The charges were brought under U.S. law, including 18 U.S.C. § 1956(a)(2)(A), "International Promotion of Money Laundering" in the Money Laundering Control Act ("MLCA").

Among the arguments made by defendants in their motion to dismiss the indictment was the assertion that Thailand, rather than the United States, would be the proper forum for consideration of the charges. In the excerpt set forth below from the U.S. brief in

opposition to defendants' motion to dismiss, the United States elaborated on several reasons why the United States is the proper forum for the indictment: (1) the plain text of the MLCA rebuts the presumption against extraterritoriality; (2) the application of § 1956(a)(2)(A) to defendants does not violate international law; and (3) provisions in Thailand's Penal Code do not make Thailand the exclusive jurisdiction over the offenses in the indictment. The full text of the U.S. brief is available at www.state.gov/s/l/c8183.htm. Most footnotes and citations to the record in the case have been omitted from the excerpt that follows.

* * * *

D. THIS COURT IS THE PROPER FORUM FOR THE INDICTMENT

Defendants ask the Court to dismiss the Indictment on the basis of principles of statutory construction, international law and the Thai government's determined judgment that it has sole jurisdiction over the alleged corrupt acts of its officials. Defendants' arguments are without merit and should be flatly rejected. In support of their arguments, Defendants introduce concepts of customary international law (as set forth by the Restatement (Third) of Foreign Relations Law) in an attempt to convince this Court that because Thailand has initiated its own proceedings against the defendants for violations of its own laws, the United States lacks the ability to prosecute the defendants for completely separate violations of United States law, that are based, in part, on the same conduct.

In making these claims, Defendants disregard the plain language of U.S. statutes that specifically provide the appropriate jurisdiction for the charges set forth in the Indictment, misapply and distort customary international law in showing that the government's prosecution is "unreasonable," and completely ignore the firmly rooted and accepted practice of concurrent jurisdiction—enabling two nations to prosecute defendants if their conduct violates the laws of both nations. Moreover, contrary to defendants' assertions, Thailand has not exercised exclusive jurisdiction in this matter. Thailand's statute is merely an assertion of its own jurisdiction, it does not prevent the punishment of the same defendants by a foreign country (such as the United States) for violations of its own laws.

1. Defendants' Statutory Construction Analysis Fails: The Presumption Against Extraterritoriality Has Been Rebutted By Section 1956's Plain Text.

Defendants' motion to dismiss alludes only briefly to the presumption against extraterritoriality (the extraterritorial application of a statute). As the Supreme Court has recently reiterated, "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2877 (2010). However, this canon of construction is "a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate," *id.*, and may be rebutted by a "clear indication of extraterritoriality." *Id.* at 2883. *See also United States v. Felix-Gutierrez*, 940 F.2d. 1200, 1204 (citing *United States v. Bowman*, 260 U.S. 94, 98 (1922) (extraterritorial application of a statute can arise from Congress's expressed intent or by a proper inference from the nature of the offense)).

As discussed at length in Part B of this Response, Congress has expressly provided for extraterritorial jurisdiction through § 1956(f). This clear indication of extraterritorial scope in the

text of the statute is sufficient to overcome any presumption against extraterritoriality that might be implicated through a statutory construction analysis.

Defendants' reliance on the *Charming Betsy* canon of avoiding a construction of U.S. that conflicts with international law is similarly unfounded in this case. While the government agrees with the general proposition that, "[w]here fairly possible, a United States statute is to be construed as not to conflict with international law or with an international agreement with the U.S." *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003) (quoting the Restatement, Section 114 and citing *Murray v. Schooner the Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)), the *Charming Betsy* canon is irrelevant for two reasons: first and most importantly, there is no ambiguity with Congress' intent. *See United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (*Charming Betsy* cannon applicable only when Congressional intent is ambiguous). In this case, there is absolutely no ambiguity in Congressional intent as Congress explicitly stated through § 1956(f) that criminal extraterritorial jurisdiction exists for MLCA offenses, including violations of § 1956(a)(2)(A) and (h). The Court thus has no need to look to the Restatement, statutory construction, or any other expression of customary international law, in this case. Secondly, and as discussed below, *Charming Betsy* is inapplicable because application of § 1956(a)(2)(A) to defendants' conduct does not create a conflict with international law or an international agreement.

2. Application of § 1956(a)(2)(A) to Defendants Does Not Violate Customary International Law

While there is no reason to do so, even if the Court were to consult customary international law in this case, the extraterritorial application of § 1956(a)(2)(A) through § 1956(f) falls well within those norms. Defendants' analysis of those principles is badly off the mark. International law requires no more from a nation's exercise of extraterritorial jurisdiction than that it comport with a recognized basis to prescribe and be reasonable. The application of § 1956(a)(2)(A) to defendants' money laundering activities easily meets those standards.

As applied by the Ninth Circuit, customary international law requires a two stage analysis: (1) whether a basis for jurisdiction to prescribe exists³⁰; and (2) whether the exercise of jurisdiction to prescribe is reasonable. *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994). It is well-settled under customary international law that "a state has jurisdiction to prescribe law with respect to...conduct that wholly or in substantial part, takes place within it territory." Restatement § 401(a). Here, the defendants knowingly used the United States' financial system in order to promote two separate unlawful activities – the Greens' FCPA [Foreign Corrupt Practices Act] offenses as well as defendants' offenses against a foreign nation, that is, Thailand. Each is specifically enumerated as such within the MLCA and represents conduct, the promotion of which through international transfers of money from or to the United States, Congress has explicitly deemed criminal under the laws of **this** nation.

The financial transactions **in the United States** that defendants caused to promote those SUAs totaled close to \$1,800,000 from 2002-2007. These international transfers originated from numerous bank accounts within the Central District of California and were transferred, at the express direction of defendant Juthamas Siriwan, to numerous bank accounts all over the world

³⁰ The Restatement description of customary international law distinguishes between jurisdiction to prescribe (a nation's jurisdiction to make its law applicable to a case) and jurisdiction to adjudicate (a nation's jurisdiction to subject persons to the process of its courts). *See* §§ 401(a),(b). Although defendants phrase their argument in terms of whether this court is the "proper forum," their real argument concerns U.S. jurisdiction to prescribe, as the authorities upon they rely makes clear.

in the name of defendant Jittisopa Siriwan – including bank accounts in Singapore, the United Kingdom, and the Isle of Jersey. A basis for jurisdiction plainly exists.

Defendants’ arguments relate less to the basis of jurisdiction under customary international law and more to a challenge of the “reasonableness” of the government’s prosecution. While this Court need not decide that the government’s prosecution in this case is “reasonable,” since Congress has clearly expressed its intention that the statute apply to conduct committed outside the United States, even if “reasonableness” under customary international law were at issue here, the government’s prosecution of defendants entirely satisfies that standard. As demonstrated below, defendants’ arguments rely on a distortion of the facts and self-serving proclamations that have little or no substance or support.³¹

Defendants’ application of the Restatement’s reasonableness factors does not in any way call into question the reasonableness of the Indictment or prosecution of defendants. Per § 403 of the Restatement, whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

As set forth below, defendants’ proffered arguments with respect to these factors fall well short of a showing of lack of “reasonableness.”

Factor (a): In support of this factor, defendants boldly state that the “center of gravity” of events giving rise to defendants’ culpability is in Thailand. In making this claim, defendants conveniently ignore the \$1,800,000 defendants caused to be wired from the United States to bank

³¹ Customary international law recognizes two additional bases for jurisdiction to prescribe: (1) jurisdiction on the basis of effect in the United States, *see* Restatement § 402(1)(c); and (2) the “protective principle.” *See id.* § 402 cmt. F. Since the defendants used a bank in the United States to promote the SUAs, their conduct plainly had serious and harmful effects within this country. Consequently, jurisdiction under the “effects” basis is present and consistent with customary international law. In addition, the United States has a strong national interest in maintaining the integrity of its financial institutions by protecting them from being used to commit money laundering offenses in the United States to promote bribery of foreign government officials or commit offenses against foreign nations. These interests justify application of the “protective” basis of jurisdiction as well. *See, e.g., Vasquez-Velasco*, 15 F.3d at 840-41 (applying 18 U.S.C. § 1959, violent crimes in aid of racketeering activity, to defendant’s participation in murders of two Americans in Mexico comported with international law); *Felix-Gutierrez*, 940 F.2d at 1205-06 (conviction for being accessory after fact of murder of DEA agent, committed in Mexico, was consistent with international law). This case is on even stronger footing than those cited above, however, because the statute at issue here, § 1956(f), contains a clear Congressional expression of extraterritorial application, whereas the statutes applied in the cases above did not.

accounts all over the world. Defendants also conveniently ignore the much larger scope of activity in the United States that occurred as a direct result of defendant Juthamas Siriwan awarding contracts to the Greens from 2002-2006, such as the subcontracting with third party companies, and the creation of numerous shell companies to service the tourism contracts. They also fail to mention the significant activity that took place at the Los Angeles office of the Tourism Authority of Thailand in connection with awarding the contracts to the Greens. Moreover, while defendants would like to claim that since the film festival was held in Thailand there is a strong link to Thailand, the fact remains that the links are much stronger in the United States and abroad. Indeed, defendants' kickback money did not even make it back to Thailand.

Factor (b): Defendants' sole argument in this regard is that they are Thai citizens residing in their home country. Defendants fail to cite any authority that stands for the proposition that prosecution of a foreign national living in his or her own home country by itself, makes such prosecution unreasonable.

Factor (c): Defendants incorrectly claim in this category that as to "the underlying specified acts resting on Thai laws" that Thailand has "asserted the fullest jurisdiction consistent with international law." Defendants' further claim that the MLCA has limited jurisdiction. Both assertions are false. As discussed further in sub-part 3 below, defendants have provided no evidence that Thailand has asserted its jurisdiction over this matter in such a way that forecloses prosecution by the United States. Indeed, Thailand has yet to even consider the United States' interests in this matter as a request for extradition has not been transmitted. As for the scope of United States' jurisdiction, as discussed previously at length, §1956(f) provides ample jurisdiction to prosecute the defendants pursuant to the statutes charged.

Factors (d)-(f): Defendants have in fact affirmed the United States' own interests in prosecuting this case. As defendants state in their motion, "the United States has an interest in preventing its financial institutions from being used to launder proceeds of unlawful activity..." Defendants then attempt to attack that interest through arguments that once again fall back on their incorrect claims of the government's perceived lack of jurisdiction and/or defendants' claims that Thailand has exercised exclusive jurisdiction. Thailand's alleged assertion of exclusive jurisdiction will be addressed in sub-part 3 below.

Factor (h). Defendants here attempt to reconcile their admission that the United States has a legitimate interest in this area with their argument that Thailand has a superior interest. Despite defendants' desire for this to be a "tie-breaker" situation, it is not. On the contrary, there is no tie to be broken in this case. International law plainly recognizes that two sovereigns can reasonably prescribe the same conduct. See Restatement §403(3) & cmt d ("Exercise of jurisdiction by more than one state may be reasonable for example, when one state exercises jurisdiction on the basis of territoriality and the other on the basis of nationality; or when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory").

Moreover, there is "no conflict of regulation by another state." Restatement § 403(2)(h). There is no tension between the Thai bribery laws and the extraterritorial application of § 1956(a)(2)(A). Thailand is pursuing allegations completely different from those of the United States. As stated in Part B of this Response, the government is **not** charging the defendants with violations of bribery or the offenses that serve as the SUAs being promoted. Defendants are charged with violating United States money laundering laws for promoting those offenses. That Thailand wishes to prosecute defendants for whatever violations of Thai law their conduct represents is not in any way in conflict with the prosecution of the defendants by the United

States for using its financial system to promote specified unlawful activities, in violation of § 1956(a)(2)(A). In addition, and as discussed further below, Section 9 of Thailand's Penal Code poses no conflict – concurrent jurisdiction among nations is a widely recognized and well accepted.

3. Section 9 of Thailand's Penal Code Is Not An Assertion By Thailand Of Sole Jurisdiction Over The Offenses In The Indictment.

Defendants' claim that Thai Penal Code Section 9 is an assertion of Thailand's superior interests or that it provides exclusive or sole jurisdiction in this matter so as to prohibit the United States from prosecuting the defendants is incorrect.

Contrary to defendants' suggestions, Thailand has not claimed a superior interest in this matter, nor has the Thai government, through Section 9 or otherwise, issued a "determined judgment that it has sole jurisdiction over alleged corrupt acts of its officials." Indeed, the United States has not received any indication, formally or informally, that Thailand has asserted sole jurisdiction over this matter, is claiming superior interests, or has otherwise expressed disapproval of the investigation leading up to the Indictment or the return of the Indictment. Thailand is well aware of the government's investigation into defendants' violation of United States' money laundering laws and has provided, via the Mutual Legal Assistance Process and at the government's request, materials in connection with the investigation and indictment of the defendants. Thailand has never claimed sole jurisdiction over these matters. It is up to Thailand, not the defendants, to make assertions of superior interests or sole jurisdiction.***

Defendants' reliance on Section 9 of the Thai Penal Code is entirely misplaced. Section 9 simply affirmatively states that government officials that commit offenses "as provided in Section 147 to Section 166 . . . outside the Kingdom shall be punished in the Kingdom." This statute does not imply or suggest exclusive jurisdiction—it is merely an assertion of its own jurisdiction. The statute does not prevent the punishment of the same defendants by a foreign country (such as the United States) for violations of its own laws. Even assuming that this was an assertion of sole jurisdiction for those offenses, this section in no way curtails the government's jurisdiction to prosecute defendants for violations of its money laundering laws. To reiterate, the government is **not** prosecuting the defendants for violation of Section 147 to Section 166 of the Thai Penal Code. Therefore, Section 9 is completely irrelevant to the jurisdiction of the United States in this matter.

Defendants' claims in this area also completely ignore the well-accepted practice of concurrent jurisdiction. As the Permanent Court of International Justice recognized in its seminal *Lotus* decision, customary international law permits concurrent jurisdiction. When a course of conduct crosses national borders "[i]t is only natural that each [nation] should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction." *The Case of the S.S. "Lotus,"* P.C.I.J., Ser. A, No. 10, at 30-31 (1927); *see also United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000)("[t]hus, concurrent jurisdiction as such raises no eyebrows among international lawyers.") The Restatement itself notes that § 403(3) "applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise

*** Editor's Note: The U.S. brief relies on the declaration of the Deputy Chief in the Asset Forfeiture and Money Laundering Section of the Criminal Division of the U.S. Department of Justice for support of its representations about the government of Thailand's stand with respect to the indictment.

impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both.”). That type of conflict is simply not present here.

Moreover, purported tensions with Thailand arising from the extraterritorial application of § 1956(a)(2)(A) are best left to the political branches of the respective governments to sort out. *Id.* at n.9 (“we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States”); *accord* Restatement, § 403(3), cmt e (“Subsection (3) is addressed primarily to the political departments of government, but it may be relevant also in judicial proceedings”).

In that vein, the United States and Thailand have an extradition treaty in force which will require the Thailand, through its own judicial process, to decide whether to approve defendants’ extraditions. Extradition Treaty with Thailand, U.S.-Thail, Dec. 14, 1983, S. TREATY DOC. NO. 98-16 (1984). In addition, if the extraditions are approved by the judiciary, the Thai executive branch will decide whether to actually surrender the defendants to the United States. In considering the United States’ extradition requests, Thai officials will, *inter alia*, determine if the defendants’ money laundering activities charged in the Indictment constitute an extraditable offense under the treaty (Article 1). Thai officials, even if they approve the defendants’ extraditions, could delay the surrender until any possible Thai prosecution and sentence has been completed (Article 12).

Perhaps most significantly, Article 4 of the treaty, entitled “Dual Jurisdiction,” provides “The Requested State may refuse to extradite a person claimed for a crime which is requested by its laws as having been committed in whole or in part in its territory, or in a place treated as its territory, provided it shall proceed against the person for that crime according to its laws.” This provision would allow Thailand to deny the United States requests for defendants’ extraditions if they choose to prosecute them for money laundering. As a result, the extradition treaty provides established mechanisms for Thailand and the United States to accommodate any foreign relations concerns which either may perceive in this case.

Defendants’ arguments and conclusory statements in this area are nothing more than an attempt to convince this Court to ignore the process for resolving the order of prosecution among nations (set out through the extradition process), ignore the statutory authority set out by Congress regarding extraterritorial application of the MLCA (as set forth by § 1956(h)), and distort the application of customary international law. There has been no violation of international law and defendants’ motion should be denied.

* * * *

After the United States filed its brief in opposition to defendants’ motion to dismiss, the court requested supplemental briefing on two issues. The section set forth below from the supplemental brief filed by the United States on December 2, 2011 addresses the second of those issues: defendants’ argument that Thailand had “organic” or “exclusive” jurisdiction over the conduct alleged in the indictment. Most footnotes and citations to the record have been omitted. The full text of the brief is available at www.state.gov/s/l/c8183.htm.

* * * *

Defendants' assertions of Thailand's "organic" or "exclusive" jurisdiction in this matter, which they claim is contained in Title 9 of Thailand's Penal Code, are references to a concept that simply does not exist in international law. There is no such thing as organic or exclusive jurisdiction in international law. Further, Title 9 of Thailand's Penal code makes no such claim.

It is well settled that international law recognizes several principles whereby a nation may enact laws that apply extraterritorially. It is equally well settled that each nation has equal rights in this regard. That is, what one nation can do under international law, any other nation can similarly do—no one nation is superior to another. These internationally accepted principles for legislating extraterritorially apply only to a nation's ability to authorize jurisdiction for itself—not to unilaterally limit the jurisdiction of another nation. International law does not recognize any right or principle that allows a unilaterally preemption of jurisdiction which would prevent the United States (and anyone else) from asserting and protecting its important interests.

The issue of one nation attempting to unilaterally preempt another nation's ability to prosecute was addressed in the Permanent Court of International Justice ("PCIJ") in 1927 in *The Case of the S.S. Lotus*, P.C.I.J., Ser. A, No. 10 (1927), which established the fundamental rule of concurrent jurisdiction in international law. In *Lotus*, a collision occurred on the high seas between a French ship (*Lotus*), under the watch of Lt. Demons, a French citizen, and a Turkish ship. The Turkish ship was cut in two, sank, and eight Turkish nationals died. The *Lotus* continued on its original course to Constantinople. France, making arguments similar to defendants' arguments in this case, claimed that it had personal jurisdiction over Lt. Demons and that Turkey could had no jurisdiction to prosecute Lt. Demons under international law. *Id.* at ¶¶ 28, 32. The PCIJ refused to accept France's argument and held that "restrictions upon the independence of States cannot therefore be presumed." *Id.* at ¶ 44. The PCIJ further held:

There is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory...there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting accordingly. This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principal stated above, established the exclusive jurisdiction of the State whose flag is flown...[I]n the Court's opinion, the existence of such a rule has not been conclusively proved.

Id. at ¶ 65-67. The PCIJ concluded as follows:

It is only natural that each [State] should be able to exercise jurisdiction and to do so in respect of the incident as a whole. **It is therefore a case of concurrent jurisdiction.**

Id. at ¶ 86 (emphasis added).

As the above case demonstrates, defendants' claims of exclusive or organic jurisdiction do not exist in international law. Rather, concurrent jurisdiction is the accepted practice.

As the Ninth Circuit stated in *United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000), "[C]oncurrent jurisdiction is well recognized in international law...two or more states may have legitimate interests in prescribing governing law over a particular controversy." Put simply, "[P]rosecution by a foreign sovereign does not preclude the United States from bringing criminal charges."²⁷ Even assuming conflicts between nations arise, as the court in *Corey* points out

²⁷ *United States v. Richardson et al.*, 580 F.2d 946, 947 (9th Cir. 1978)(denying motion to dismiss where defendant was already prosecuted in Guatemala for the same offense). See also *United States v. Guzman*, 85 F.3d 823, 826 (1st Cir. 1996)(holding that when a defendant in a single act violates the "peace and dignity" of two

“American courts have on numerous occasions managed conflicts arising when two nations had authority over the same issue.” *Id.* These conflicts are often managed by treaty. “[I]ndependent nations cede their exclusive control over their territory through treaties, and the terms of those agreements [treaties] govern that concurrent authority.” *Id.* at 1180.

Moreover, contrary to defendant’s assertions, Thailand, through Title 9 of its Penal Code or otherwise, has not attempted to claim organic or exclusive jurisdiction over the offenses alleged in the indictment. According to defendants, Title 9 reads as follows:

Government Officials commits the offences as provided in Section 147 to Section 166...outside the Kingdom shall be punished in the Kingdom

The term “exclusive” is nowhere to be found in the above statute. Defendants simply insert that term as if it were included. It is not. Likewise, the term “exclusive”, “organic”, or even “sole” nowhere appears in the Thai Supreme Court cases defendants cite, the Thai legislative history defendants cite, or their own Thai lawyer’s declaration. The absence of any exclusivity language is consistent with the accepted principle that the concept does not exist in international law and shows that Thailand is simply providing for its *own* jurisdiction to prosecute its nationals when they commit crimes abroad.

* * * *

5. Organized Crime

See Chapter 16.A.7. for discussion of a new executive order and sanctions regime directed at transnational criminal organizations.

6. Corruption

The Fourth Conference of States Parties (“COSP”) to the UN Convention Against Corruption (“UNCAC”) convened from October 24-28, 2011 in Marrakech, Morocco. This was the first COSP since the adoption in 2009 of a peer review mechanism (“Review Mechanism”) to promote implementation of the anti-corruption standards enshrined in the UNCAC. A State Department Media Note, issued on October 21st and available at www.state.gov/r/pa/prs/ps/2011/10/175964.htm, described the participation and support of the United States for the COSP and UNCAC:

The United States supports and will be represented at the October 24-28 Conference of States Parties (COSP) to the UN Convention Against Corruption (UNCAC) in Marrakech, Morocco, where the 154 States Parties to the UNCAC**** will discuss implementation of the Convention and ways to advance international efforts to prevent and fight corruption. The United States is committed to engaging with other countries on

sovereigns by breaking the laws of each, he has committed two distinct offences and can be prosecuted and punished for both.)

**** Editor’s note: As of May 10, 2012, the number of Parties to UNCAC had reached 160.

preventing and combating corruption, and contributed more than \$1.5 billion for anti-corruption and good governance assistance around the globe in the last fiscal year.

The U.S. has also contributed significantly to the UN Office on Drugs and Crime towards implementation of the UNCAC, providing over \$3.5 million in funding in the last three years. This fourth UNCAC COSP will focus on asset recovery; the prevention of corruption; international cooperation; and improving the Review Mechanism that was adopted at the third COSP in Doha in 2009 to review implementation of the UNCAC at the national level. The United States was one of the 27 countries selected to be reviewed in the first year of the first review cycle and is currently in the process of finalizing its report in consultation with its peer reviewers. The United States is committed to leading by example and will publish its entire report online once completed. Additional issues to be addressed at this COSP include the provision of technical assistance to help countries implement their UNCAC commitment and the participation of non-governmental organizations and international organizations as observers in the COSP.

Over 150 countries attended the Fourth COSP to the UNCAC. The United States worked closely with Egypt and like-minded governments to strengthen international cooperation on asset recovery and develop an efficient forum for practitioners to meet on international cooperation. The United States also led a successful effort to increase financial oversight and discipline relating to the use of UN regular budget funding for the Review Mechanism. The COSP adopted a resolution expanding the formal participation of international organizations, signatories and non-signatories in the review process and also the Morocco-sponsored “Marrakesh Declaration” on preventing corruption. The Parties accepted the Russian Federation’s offer to host the sixth COSP in 2015 (Panama will host the fifth COSP in 2013) and decided that the seventh COSP will be held at the seat of the UN Secretariat in Vienna.

7. Piracy

a. Overview

In 2011, as this section discusses in detail below, the United States continued its active efforts to counter piracy off the coast of Somalia through various international initiatives and domestic prosecutions of individuals suspected of piracy and related offenses. On March 30, 2011, Assistant Secretary of State Andrew J. Shapiro addressed the International Institute for Strategic Studies on the topic of U.S. approaches to counter-piracy. Assistant Secretary Shapiro’s remarks, excerpted below, are available in full at www.state.gov/t/pm/rls/rm/159419.htm. Assistant Secretary Shapiro described current multilateral and U.S. efforts to counter piracy and called for further steps, including announcing the United States’ increased willingness to consider additional mechanisms, beyond national prosecutions, for punishing and deterring piracy.

* * * *

Despite two years of international political and naval coordination, the problem is growing worse. Last year, 2010, witnessed the highest number of successful pirate attacks and hostages taken on record. And thus far 2011 is on track to be even higher. Close to 600 mariners from around the world are being held hostage in the region, some for as long as six months. Tragically, four Americans were brutally murdered by Somali pirates just last month.

The attacks are more ruthless, more violent and wider ranging. Hostages have been tortured and used as human shields and blowtorches have been used to open safe haven areas on ships in order to seize crews, and hold them for ransom. Pirates currently hold around 30 ships, most for ransom.

As international action has been taken to address the challenge, the pirates have responded. The way pirates operate has become more sophisticated. In recent months the use of mother ships—which are themselves pirated ships with hostage crews—has extended the pirates’ reach far beyond the Somali Basin. Mother ships launch and re-supply groups of pirates who use smaller, faster boats for attacks. They can carry dozens of pirates and tow many skiffs for multiple simultaneous attacks.

This has made pirates more difficult to interdict and more effective at operating in seasonal monsoons that previously restricted their activities. Somali pirates now operate in a total sea space of approximately 2.5 million square nautical miles, an increase from approximately 1 million square nautical miles two years ago. This increase makes it difficult for naval or law enforcement ships and other assets to reach the scene of a pirate attack quickly enough to disrupt an ongoing attack.

At Secretary Clinton’s direction, we are intensively reviewing our counter-piracy efforts to determine an even more energetic and comprehensive approach to respond to piracy in the Arabian Sea, Gulf of Aden, and the Indian Ocean region. As we move forward, we are looking into many additional possible courses of action that seek to overcome the ongoing challenges of piracy.

In the near and mid-term, we plan to focus on several approaches that have the potential to significantly increase risks to the pirates while reducing by equal measure any potential rewards that they think they may gain. We are considering a broad range of options, from intensifying naval operations, to pursuing innovative approaches to prosecute and incarcerate pirates through innovative national and international approaches. Furthermore, we are looking at additional ways to more aggressively target those who organize, lead, and profit from piracy operations, including disrupting the financial networks that support them.

But before I go into depth on our way forward, let me discuss briefly the actions that are already underway.

To address the problem, the United States has, from the beginning, adopted a multilateral approach. Piracy affects the international community as a whole and can only be effectively addressed through broad, coordinated, and comprehensive international efforts. In January 2009, we helped establish the Contact Group on Piracy off the Coast of Somalia, which now includes over 60 nations as well as international and industry organizations, to help coordinate national and international counter-piracy policies and actions.

We have also developed an integrated multi-dimensional approach toward combating piracy that focuses on: security—through the projection of military power to defend commercial

and private vessels; prevention—through best practices measures conducted by the private sector; and deterrence—through effective legal prosecution and incarceration.

I'll now expand on each of these areas:

First, security. In an effort to prevent attacks, the United States established Combined Task Force 151—a multinational task force charged with conducting counter-piracy naval patrols in the region. The objective of this Combined Task Force is to secure freedom of navigation for the benefit of all nations. It operates in the Gulf of Aden and off the eastern coast of Somalia, covering an area of over one million square miles. In addition to this effort, we have a number of coordinated multi-national naval patrols off the Horn of Africa. NATO is engaging in Operation Ocean Shield, the European Union has Operation ATALANTA, and other national navies in the area conduct counter-piracy patrols as well. On any given day up to 30 vessels from as many as 20 nations are engaged in counter-piracy operations in the region, including countries new to these kinds of effort like China and Japan.

* * * *

The second area we have focused on is prevention. Any effective approach to combating piracy must involve the private sector. To prevent pirate activity, we have encouraged the commercial and private vessels to take action to prevent piracy before it happens. The shipping industry is increasingly implementing industry-developed “best management practices” to prevent pirate boardings before they take place. These guidelines were developed to identify self-protection measures that have proven successful in preventing boarding and seizure, and enabling rescues by naval forces when boarded. ...

* * * *

We continue to discourage ransom payments and to actively seek to deny the benefits of concessions to hostage takers. The increase in attacks over the last year is a direct result of the enormous amounts of ransom now being paid to pirates. The United States has a long tradition of opposing the payment of ransom, and we have worked diligently to discourage or minimize ransoms. But many governments and private entities are paying, often too quickly and to the detriment of future victims, the escalating ransoms that enable the pirates' predatory behavior. Some consider it the cost of doing business. However, every ransom paid, which now averages \$4 million per incident and has reached as much as \$9.2 million dollars, further institutionalizes the practice of hostage-taking for profit and funds its expansion as a criminal enterprise. Since January 2010, Somali pirates received approximately \$75-85 million in the form of ransom payments. Of course, companies want to get their crews, ships, and cargoes back, but we have to find a way to break this cycle of increasing the pirates' success and to shut down this ballooning criminal enterprise that makes piracy an increasingly lucrative profession, especially for the impoverished Horn of Africa.

Third, to deter piracy, effective legal prosecution is vital. We are urging all states to share the burden of prosecuting suspected pirates in their national courts, and incarcerating those convicted.

When attacks do occur, the international community needs effective and appropriate ways of dealing with captured pirates. Under international law, piracy is a crime of universal jurisdiction. This means that all states are authorized under international law to prosecute cases

of piracy, whether or not that state has a direct link to the event. We applaud the approximately 18 countries that have pursued the prosecution of almost 950 pirates in their national courts. However, despite this figure, a significant number of suspected pirates encountered by naval forces are still being released without being prosecuted, sometimes for lack of evidence. We have not seen evidence that the prosecutions to date have had a deterrent effect, probably not least because pirates are reaping enormous returns with relatively little risk.

In addition, many of the countries affected by piracy—flag states, states from where many crew members hail, and many of our European partners—have proven to lack either the capacity or the political will to prosecute cases in their national courts. Furthermore, states in the region that have accepted suspects for prosecution to date have been reluctant to take more, citing limits to their judicial and prison capacities and insufficient financial support from the international community. As a result, too many suspected pirates we encounter at sea are simply released without any meaningful punishment or prosecution, and often simply keep doing what they were doing. This is the unacceptable ‘catch and release’ situation that has been widely criticized, and for which we must find a solution.

This multi-dimensional approach, focusing on security by expanding naval activities, emphasizing prevention through encouraging best practice measures by the private sector, and providing a deterrent through legal prosecution, provides a solid framework for our counter-piracy efforts.

Unfortunately further action is needed. ...

* * * *

In the near and mid-term we can focus on several approaches that have the potential to significantly increase risks to the pirates while at the same time reduce their potential rewards. We are considering a broad range of options. These center on four key areas: pursuing additional mechanisms to prosecute and incarcerate pirates; aggressively targeting those who organize, lead, and profit from piracy operations; exploring expanded military options that will not place undue risks or burdens on our armed forces; and intensifying efforts to encourage the shipping industry to employ best management practices.

First, on enhancing the prosecution and incarceration of pirates. One of our major efforts to counter piracy has been to find creative ways to increase the ability and willingness of other states to undertake what should be a national responsibility to hold criminals accountable for attacks on national interests. The United States has actively prosecuted pirates involved in attacks on U.S. vessels where there has been sufficient evidence to support the case. To date, that totals 26 persons involved in several attacks:

- the April 2009 attack on the MAERSK ALABAMA,
- attacks in April of last year on the USS NICHOLAS and the USS ASHLAND,
- and most recently, the attack in February that resulted in the killing of the four Americans on the QUEST.

Fourteen men, thirteen from Somalia and one from Yemen, have been indicted on federal criminal charges for their suspected involvement in this heinous incident. The Somali pirate convicted in the MAERSK ALABAMA attack received a sentence of 33 years and 9 months and the pirates involved in the NICHOLAS attack have received life sentences plus 80 years. These successful prosecutions, like the over 900 other national prosecutions taking place around the world, prove that pirates can be successfully prosecuted in any state with the basic judicial

capacity and political will to do so. [Editor's note: see section c below for updated information about U.S. prosecutions.]

Despite these successes, we need to acknowledge the reality that many states, to varying degrees, have not demonstrated sustained political will to criminalize piracy under their domestic law and use such laws to prosecute those who attack their interests and incarcerate the convicted. The world's largest flag registries—so-called “flags of convenience”—have proven either incapable or unwilling to take responsibility. And given the limited venues for prosecution, states have been reluctant to pursue prosecutions of apparent or incomplete acts of piracy, limiting our ability to prosecute suspects not caught in the middle of an attack.

It is true that suspected pirates have been successfully prosecuted in ordinary courts throughout history. Because of this, the Administration has previously been reluctant to support the idea of creating an extraordinary international prosecution mechanism for this common crime. Instead, the Administration has focused on encouraging regional states to prosecute pirates domestically in their national courts. However, in light of the problems I've described to you today, the United States is now willing to consider pursuing some creative and innovative ways to go beyond ordinary national prosecutions and enhance our ability to prosecute and incarcerate pirates in a timely and cost-effective manner. We are working actively with our partners in the international community to help set the conditions for expanded options in the region. In fact, we recently put forward a joint proposal with the United Kingdom suggesting concrete steps to address some of the key challenges we continue to face.

One of the most important things we must do is expand incarceration capacity in the region, as lack of prison capacity is perhaps the most common reason states are reluctant to accept pirates for prosecution. We are already seeing progress in this area. Just this week, a new maximum security prison opened in Northern Somalia to hold convicted pirates. We also support the efforts underway to develop a framework to accommodate the transfer of convicted pirates back to Somalia to serve their sentences in their home country.

In addition, we have suggested consideration of a specialized piracy court or chamber to be established in one or more regional states. The international community is currently considering this idea, along with similar models that would combine international and domestic elements. These ideas are under discussion both in the UN Security Council and in the Contact Group.

It is also critical to continue to support and enhance the prosecution-related programs in the region that are already underway. And we continue to believe one of the most vital aspects remains Somalia's long term ability to construct its own active and independent judicial system.

The second area we are considering is how to more effectively target financial flows from piracy, possibly by using approaches similar to the ones we use to target terrorists.

Somali piracy is an organized criminal enterprise, like a mafia or racketeering criminal organization. A key element of our overall counter-piracy approach is the disruption of piracy-related financial flows. We need to hit pirate supply lines—cutting them off at the source. A significant effort must be made to track where pirates get their fuel, supplies, ladders and outboard motors in Somalia and in other nearby countries and to explore means to disrupt this supply. Most importantly, we must focus on pirate leaders and financiers to deny them the means to benefit from ransom proceeds. They must be tracked and hunted by following the money that fuels their operations using all available information. This should include by tracing the money that fuels their operations with the same level of rigor and discipline we currently employ to combat other transnational organized crime.

This is particularly critical, considering the recent uncorroborated open source reports of possible links, direct or indirect, between al-Shabaab in Somalia—specifically al-Shabaab-linked militia—and pirates. Al-Shabaab and the pirates operate largely in separate geographic areas and have drastically opposed ideologies. However, we have seen reports that al-Shabaab is receiving ad-hoc protection fees from pirate gangs working in the same area. Obviously, this is concerning. Let me be clear: while we have seen no evidence to date of direct ties between the two groups, it would not be uncommon for criminal gangs working in the same ungoverned space to share resources or pay kickbacks to one another.

Finally, it is time to explore additional means to map and disrupt the financial flows and criminal masterminds behind the business of piracy before any links are solidified or money is put into the pockets of a group responsible for terrorist attacks. At the beginning of March, the United States hosted a meeting of Contact Group members at which the international community began discussing the development of methods to detect, track, disrupt, and interdict illicit financial transactions connected to piracy and the criminal networks that finance piracy. As we make progress and pirate leaders are identified, we should press local authorities in the piracy-affected region to take action against these leaders and either prosecute them or turn them over to other states for prosecution. Piracy is impacting Americans', Africans', and others' lives around the world, and we should devote resources commensurate to the problem.

The third area we are exploring for increased action involves additional ways to work with our Department of Defense colleagues to take further action at sea, focusing on steps that would have real impacts on pirate activity without overextending our military. For its part, the United States Navy is already taking proactive measures to remove pirate boats from action when they can do so without unduly risking human life or unnecessarily expending scarce resources. Just last week, U.S. naval forces successfully answered a Philippine-flagged merchant vessel's distress call as pirates attempted to board. U.S. forces, already in the area as part of Operation Enduring Freedom, fired warning shots, causing the pirates to flee and foiling the attack. As American assets were already on the scene, the U.S. military was ready and able to respond without stretching our armed forces too thin.

We at the State Department need to continue to work with our DoD colleagues to explore using other tools at our disposal to further disrupt pirate vessels at sea. Of course, we must always act in a fashion that does not cause the situation on land in Somalia to worsen.

Fourth and finally, we must intensify our efforts to encourage commercial vessels to adopt best management practices. The best defense against piracy is vigilance on the part of the maritime industry. The vast majority of successful pirate attacks are against ships that do not adopt best management practices. The U.S. government requires U.S.-flagged vessels sailing in designated high-risk waters to take additional security measures, including having extra lookouts, having extra communications equipment, and being prepared at all times to evade or resist pirate boarding. I would note that, to date, not a single ship employing armed guards has been successfully pirated.

Combating piracy is not just the job of governments. It requires joint action from both the international community and the private sector. If all commercial fleets worldwide were to implement the measures as appropriate, we would be in a much better position to reduce the rate of successful pirate attacks. Our partners in the maritime industry must continue to step up and take further action to do their part.

b. International support for efforts to bring suspected pirates to justice

In international fora, the United States continued to underscore the importance of bringing suspected pirates to justice and took steps to help states enhance their capacities to pursue prosecutions and incarcerate individuals convicted of piracy and piracy-related crimes.

(1) UN Security Council

The Security Council adopted three resolutions on piracy in 2011. U.N. Doc. S/RES/1976, U.N. Doc. S/RES/2015, and U.N. Doc. S/RES/2020. The United States actively supported the work of the Security Council to counter piracy and was responsible for drafting Resolution 2020. At a Security Council briefing on a report on piracy prosecution on January 25, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, welcomed many of the report's recommendations. Ambassador Rice's statement, excerpted below, is available in full at <http://usun.state.gov/briefing/statements/2011/155277.htm>.

* * * *

...[P]iracy off the coast of Somalia threatens us all. Captured crews are used as human shields or held for ransom. And the region faces higher prices for basic commodities. Piracy endangers the critical delivery of humanitarian aid. And the rising sums of illicit funds flowing into Somalia through ransom payments further destabilize the region and fuel the growth of organized crime and terrorism.

Many members of this Council participate in the Contact Group on Piracy off the Coast of Somalia, which has proved a flexible and efficient forum for coordination and information-sharing. Much is being done to combat piracy, from disseminating best practices to youth-employment projects. But plainly, much more work remains to be done.

As the report notes, industry adoption of best-management practices and naval operations off the coast of Somalia reduce the rate of successful pirate attacks. Several mechanisms can certify such steps. For example, measures are reviewed as part of the process whereby a vessel's security plan is approved under the International Ship and Port Facility Security Code. Under other International Maritime Organization provisions, such as the International Safety Management Code, documentation that a vessel has implemented the appropriate best practices can be issued. We welcome assistance in further encouraging the adoption of such best practices, and we encourage nations to contribute ships to patrol the waters off the Somali coast, as several of our fellow Council members have already done.

We also support the report's recommendation that targeted cooperation with Somaliland and Puntland be increased.

But the best long-term solution to piracy is a stable Somalia. So the United States supports a wide range of economic-development programs there, including micro-credit and good-governance initiatives. Tailored initiatives that actively involve the local community may do the most good.

The United States also agrees that prevention, prosecution, and incarceration are essential elements of any counter-piracy initiative. We strongly support the report's recommendations that

all states criminalize piracy, as defined in the United Nations Convention on the Law of the Sea, and adopt universal jurisdiction over this grave crime. The report recognizes the need to raise awareness, to encourage piracy's victims to testify against their attackers, and to explore means to provide such testimony, including via videoconference. We agree.

Mr. President, the United States has long encouraged flag states and states whose crews and vessel owners have fallen prey to pirates to pursue prosecutions in their domestic courts to the greatest extent possible. We welcome the report's call for all states to strengthen their commitment and ability to prosecute. In cases where American vessels have been attacked, we have prosecuted the suspects. We also recognize the need to develop one or more reliable, practical options for prosecution in the region. Kenya and the Seychelles are successfully prosecuting piracy cases in their national courts; Tanzania has changed its laws to allow it to prosecute suspected pirates captured elsewhere. These countries experience indicates that prosecution in the region is potentially viable. We should continue to support regional states' efforts to try suspected pirates in their national courts. Not only does such support help ensure that piracy bears judicial consequences, it also enhances the judicial capacity of the region as a whole. As we continue to discuss additional mechanisms, we should also support and strengthen prosecution-related programs in the region that are already underway.

My government also remains open to exploring creative solutions to increase and facilitate domestic prosecutions. The report suggests forming specialized piracy courts in Somaliland and Puntland, as well as a Somali court seated in another country in the region. We would support further consideration of these ideas including in the Legal Working Group on Piracy off the Coast of Somalia, which has been exploring prosecution mechanisms for some time now.

But as the UN report recognizes, incarceration may be the most significant constraint on piracy prosecutions. The UN Development Program and the UN Office on Drugs and Crime are supporting prison rehabilitation projects, but additional support and options for long-term incarceration are needed. We encourage states to work with and through UNODC to develop additional facilities where convicted pirates can serve their sentences. The lack of places to incarcerate convicted pirates significantly hinders additional national prosecutions and makes it harder to ensure judicial consequences for piracy.

Finally, as the report notes, we must pay more attention to the instigators, leaders, and financiers of piracy. We look forward to the conclusions of the next Contact Group plenary meeting about how to move forward. It is critical to disrupt the financial flows that make piracy both possible and profitable. To that end, the United States will convene on March 1st in Washington an ad hoc meeting of Contact Group participants on the financial aspects of piracy, as called for by the Contact Group, to develop a strategy and an action plan on this topic.

Mr. President, over the last few years, pirates have been using more and more violence. Their tactics have become more sophisticated, and their vessels have hunted further and further out at sea. We must work together and remain vigilant. In cooperation with the international community, the United States will do its part to combat this common and urgent threat.

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After the Security Council adopted Resolution 2015, the United States issued a press statement welcoming the steps taken in the resolution. The press statement, available at www.state.gov/r/pa/prs/ps/2011/10/176231.htm, included the following:

The United States welcomes the UN Security Council's unanimous call to all nations in the world to continue their cooperation in the investigation and prosecution of all persons responsible for acts of piracy, armed robbery at sea, and Kidnap for Ransom off the coast of Somalia. This includes key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks. We also welcome the further practical steps taken by the Council in support of national, regional and international efforts to prosecute pirates, and to enhance related prison capacity.

This development is the latest indication of growing international consensus that these transnational criminals pose a serious shared security challenge for the safety and well-being of seafarers, global commerce and humanitarian aid.

(2) Contact Group on Piracy off the Coast of Somalia

In 2011, the United States continued to actively participate in the Contact Group on Piracy off the Coast of Somalia ("CGPCS" or "Contact Group"). See *Digest 2009* at 464-67 regarding the creation of the CGPCS and the website of the CGPCS, www.thecgpcs.org, for more information. Three plenary sessions were held in 2011 in March, July, and November. Communiqués released at the conclusion of each session are available at www.thecgpcs.org/plenary.do?action=plenaryMain#. On November 17, 2011, the tenth plenary session of the CGPCS convened in New York. A State Department Media Note, available at www.state.gov/r/pa/prs/ps/2011/11/177249.htm, summarized the accomplishments of the Contact Group:

Since its initial meeting in January 2009, the Contact Group has nearly tripled in size—a testament to the global consensus that piracy poses a shared security challenge to maritime safety and to the need for further concerted and coordinated international action. Among its accomplishments to date, the Contact Group has:

- Facilitated coordination of international naval patrols through the operational coordination of an unprecedented international naval effort from more than 30 countries working together to protect transiting vessels. The United States coordinates in these efforts with other multilateral coalitions such as NATO's Operation Ocean Shield and the European Union's Operation ATALANTA. The United States also looks to further develop counter-piracy cooperation with several other nations deploying forces to the international counter-piracy effort, including China, India, Japan, and Russia.
- Partnered with the shipping industry to improve practical steps merchant ships and crews can take to avoid, deter, delay, and counter pirate attacks. The shipping industry's use of Best Management Practices and the increasing use of Privately Contracted Armed Security Personnel are among these measures, which have proven to be the most effective deterrents against pirate attacks.

- Strengthened the capacity of Somalia and other countries in the region to combat piracy, in particular by contributing to the UN Trust Fund Supporting Initiatives of States Countering Piracy off the Coast of Somalia; and
- Launched a new initiative aimed at disrupting the pirates' financial and logistical networks ashore through approaches similar to those used to target other types of organized transnational criminal networks.

The Communique from the Tenth Plenary Session of the CGPCS in New York on November 17, 2011 is excerpted below and available in full at www.thecgpcs.org/plenary.do?action=plenarySub&seq=19.

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2 The CGPCS emphasized that close international coordination continues to be of central importance to effectively tackle piracy off the coast of Somalia and in the wider Indian Ocean. The CGPCS underlined that the ultimate responsibility to tackle piracy lies with Somalia. It welcomed significant developments in counter-piracy efforts by the international community since the Ninth CGPCS Plenary Session in July 2011.

In particular, it:

- stressed the international community's anger at the ongoing suffering of kidnapped innocent seafarers and reports of longer captivity periods and increasingly violent treatment at the hands of pirates, resulting in psychological, physical and medical stress, and expressed the unacceptability of this situation and its deep sympathy for the captive seafarers and their families, urged flag administrations to effectively engage with shipowners to provide information, including on the welfare of the crew, measures being taken for their release and the status of payment of their wages, to the substantially interested states so that the families can be kept informed, and called on the shipping industry to provide all necessary assistance to seafarers after their release;
- concluded that piracy continues to pose a serious threat, despite the positive trend of fewer ships and crew being held hostage since the Ninth CGPCS Plenary Session (10 ships and 240 crew were held hostage as of 17 November 2011, compared to 17 ships and 393 hostages in July 2011), as the number of attacks is still on the rise, albeit with a decreasing rate of success and that the situation requires continued strong engagement by the international community and sustained contributions to the military operations;
- therefore expressed its grave concern that the provision of military forces for the antipiracy operations is likely to fall short of the numbers required; and called upon states to remedy this situation;
- welcomed the start of the construction of the regional training center in Djibouti, which will be used to coordinate regional training as well as provide a venue augmenting existing training centres for training in the framework of the Djibouti Code of Conduct;

- noted the important deterrent role of military Vessel Protection Detachments (VPDs) in preventing vessels being pirated;
- noted the increased use of privately contracted armed security personnel (PCASP), as well as the fact that no vessel with PCASP on board has been successfully pirated, and the ongoing work in the IMO on guidance for the role of PCASP on board merchant vessels and the complementary efforts at self-regulation undertaken by the sector itself;
- reconfirmed the persisting need to facilitate criminal investigation and prosecution of apprehended pirates as a top priority for the CGPCS, as this is a requisite to the effectiveness of the anti-piracy coalition, and therefore welcomed the adoption of UN Security Council Resolution 2015 (2011), in which, inter alia, the UN Security Council decided to continue its consideration as a matter of urgency, without prejudice to any further steps to ensure that pirates be held accountable, of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support;
- expressed its appreciation for the valued efforts of Somalia, the Seychelles and Kenya and other countries in and outside the region in undertaking prosecutions and detaining convicted pirates, and encouraged other regional countries to contribute to these efforts and noted the need to look into the issue of communication between detained suspected pirates, Somali authorities and their families;
- stressed the urgent need to increase the number of prosecutions as a top priority and for all States to update their national legislation and relevant procedures, in order to actually undertake prosecutions, including of pirate leaders, financiers and organizers, whenever evidentiary standards are met;
- welcomed the new contributions of \$4.9 million and outstanding pledges of about \$1.3 million to the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia in 2011, as well as the total contributions of \$10 million received by the Trust Fund since its inception in January 2010, of which \$6.9 million has been disbursed, and called on States as well as on the private sector to continue to contribute to the Trust Fund;
- confirmed its strong support for the Roadmap agreed by the Transitional Federal Government (TFG) and the regional administrations of Somalia in September 2011, and the need for its early and full implementation, including the urgent establishment of an Exclusive Economic Zone, consistent with international law, an agreed maritime security strategy, a coordinated maritime law enforcement capability, and the enactment of antipiracy legislation, as well as the building of capacity to prosecute, try and imprison piracy and maritime law cases, the appointment of a counter-piracy co-ordinator under a designated Minister and the development of programmes for anti-piracy community engagement and linked coastal economic projects;
- underlined therefore its support for the “Kampala Process”, which ensures effective dialogue and co-ordination between Somali authorities, and made clear the need for UNPOS and the CGPCS to keep each other updated on current and planned activity in implementing these elements of the Roadmap, including

priorities and funding shortfalls, to enable donors to make best informed decisions, and further noted the United Nations' call to consider convening future meetings of the CGPCS and/or its Working Groups inside Somalia to strengthen coordination on the ground;

- acknowledged the important role of UNODC and UNDP in supporting Somali and regional authorities to prosecute and detain suspected pirates and the strengthening of the Somali judicial system as a whole, and stressed the importance of elaborating modalities for repatriation of piracy suspects who have been acquitted or those that have completed their prison terms;

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4 The CGPCS noted the announcement by the United States and the Republic of Korea that the Republic of Korea will take over the chairmanship of Working Group 3 in March 2012.

5 The CGPCS emphasized that adequate means must be provided to the international response to piracy, covering, amongst others: sufficient military assets to ensure an effective military response; furthering efforts of law enforcement and judicial agencies to effectively investigate and prosecute all those engaged in and profiting from piracy; stronger support from the international community for the development of prosecution and detention capacity in Somalia and in the region, to be provided, inter alia, through the Trust Fund, which the private sector is called upon to contribute to as well;

6 The CGPCS noted that a solution to piracy can only be found by combining the counterpiracy activities outlined above with the wider efforts aimed at stabilizing Somalia, which include promoting good governance and rule of law, strengthening the Somali government's institutions and fostering socio-economic development through a comprehensive, multi-faceted approach. The CGPCS therefore welcomed the engagement by the Special Representative of the Secretary-General for Somalia with the CGPCS and welcomed the strengthened cooperation between the CGPCS and the International Contact Group on Somalia.

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c. U.S. prosecutions

Domestically, the United States continued to pursue the prosecution of captured individuals suspected in several pirate attacks. As of March 2012, the United States had pursued the prosecution of 28 suspected pirates in U.S. courts for their involvement in five distinct attacks on U.S. ships or U.S. interests. Prosecutions resulted in 18 defendants receiving convictions, 16 of whom have been sentenced, and none have been acquitted. Prosecutions related to the five attacks on U.S. ships or interests are summarized below.

(1) M/V Maersk Alabama: In 2010, Abduwali Abddukhadir Musé was sentenced to 33 years and nine months of imprisonment for his role in the 2009 hijacking of the Maersk Alabama. He had pleaded guilty to felony counts of hijacking maritime vessels, hostage taking, and kidnapping.

(2) USS Nicholas: The five defendants who attacked the USS Nicholas were convicted and sentenced to imprisonment for life plus 80 years in November 2010. That case is

currently on appeal in the U.S. Court of Appeals for the Fourth Circuit.

(3) USS Ashland: The case of the defendants who attacked the USS Ashland is on interlocutory appeal in the Fourth Circuit because the district court dismissed the piracy charge in the case, although several other charges remain. One of the defendants involved in the USS Ashland attack, Jama Idle Ibrahim, a.k.a. Jaamac Ciidle, pleaded guilty in the U.S. District Court for the Eastern District of Virginia to charges relating to that attack, and he received a 30-year sentence in November 2010. Five other defendants are awaiting trial.

(4) CEC Future: Ciidle also pleaded guilty in the U.S. District Court for the District of Columbia to charges arising from his participation in the hijacking of the M/V CEC Future, a Danish-owned merchant ship, in the Gulf of Aden in November 2008. In April 2011, he received a sentence of 25 years' imprisonment for that attack. Also in the M/V CEC Future case, a Somali named Ali Mohamed Ali was arrested on April 20, 2011, and indicted for conspiracy to commit piracy and other charges that allege he acted as a negotiator on behalf of Somali pirates during the takeover of the M/V CEC Future. His trial is scheduled to begin in July 2012.

(5) S/V Quest: A federal grand jury in the Eastern District of Virginia indicted 13 Somalis and one Yemeni on March 8, 2011, with charges of pirating a yacht, the S/V Quest, and taking hostage four U.S. citizens, who were ultimately killed before their release could be secured. Eleven individuals arrested in connection with the attack on the Quest have pled guilty to piracy charges, including the leader of the pirates who attacked the Quest. Nine of the eleven who have pled guilty have been sentenced to life, two sentences are pending, and three defendants are awaiting trial. Also in the Quest case, the grand jury indicted piracy negotiator Mohammad Saaili Shibin, on charges of piracy, conspiracy to commit kidnapping, and weapons charges. Shibin was indicted also for his role in the M/V Marida Marguerite piracy. *****

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Overview

On December 14, 2011, United States Ambassador-at-Large for War Crimes Issues, Stephen J. Rapp, addressed the Assembly of State Parties ("ASP") of the International Criminal Court ("ICC") in New York on behalf of the United States observer delegation. Ambassador Rapp discussed not only the United States' ongoing engagement with the ICC, but other efforts by the United States to advance the goal of accountability for international crimes.

Ambassador Rapp's remarks, excerpted below, are available in full at www.state.gov/j/qc/us_releases/remarks/179208.htm.

***** Editor's note: On April 27, 2012, following a nine-day trial, a federal jury convicted Shibin. He faces life imprisonment at his sentencing, scheduled for later in 2012.

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The United States ... welcomes the opportunity to work with ... the newly elected Court officials—including Prosecutor-elect Fatou Bensouda and six new judges. We also wish to commend the tireless efforts of the search committee for the position of prosecutor in identifying and reviewing the qualifications of the candidates for this critical position.

...[A]t this, the tenth session of the ASP, we should take the opportunity to reflect on the progress the ICC has made in establishing itself as a standing forum for international justice, as well as on the challenges that lie ahead. As many of the ad hoc tribunals and courts draw to a close in the coming years, the ICC can become an even more important safeguard against impunity. And as the Court moves beyond its first trials into the next phase of its development, we should continue to focus on how to strengthen the global system of accountability for genocide, war crimes, and crimes against humanity. We must make good on our promise to victims of atrocities around the world: that with the institutionalization of international justice and the growth of complementary domestic mechanisms, they will be assured justice, and that accountability will help their communities emerge from violence toward peace, from lawlessness toward respect for the rule of law.

...[A]chieving the promise of accountability entails a holistic and wide-ranging approach. Most recently, consistent with the principle of positive complementarity, we have worked to bolster the capacity of national governments to ensure justice in the face of grave atrocities. We have lent resources to advise and assist national systems in countering some of the worst perpetrators of atrocity crimes, including assistance to prosecute sexual and gender-based violence. And although the United States is not a party to the Rome Statute, we are continuing to engage with the ICC and States Parties to the Rome Statute to end impunity for the worst crimes. Over the past several years, we have sent active observer delegations to the ASP sessions and the Review Conference in Kampala. We have actively engaged with the [Office of the Prosecutor (“OTP”)] and the Registrar to consider specific ways that we can support specific prosecutions already underway, and we have responded positively to a number of informal requests for assistance. We supported the UN Security Council’s ICC referral regarding Libya and are working hard to ensure that those charged by the Court there face justice consistent with international standards. From the DRC to Cote d’Ivoire, Darfur to Libya, we have worked to strengthen accountability for atrocities because we know, as President Obama has said, that “justice is a critical ingredient for lasting peace.”

What are the concrete steps we can take to continue to advance this common cause?

First, at both the international and national levels, we should continue to recognize and promote the important role that justice and reconciliation play in resolving conflicts. Today, we do not have to look far to see evidence of this support. For example, since we last met in New York one year ago, the Security Council made history with its first unanimous referral to the ICC of the situation in Libya. Resolution 1970, adopted even as atrocities were being perpetrated, represented an historic milestone in the fight against impunity. The referral in Resolution 1970

has served to keep the principle of accountability in the fore of the effort to transition from authoritarianism to democracy in Libya. It is clear that justice and reconciliation efforts will now be critical components of a successful transition that allows all of Libyan society to leave behind what has been, in many respects, a tragic and bloody past.

Second, States must elevate as a priority the prevention of and response to mass atrocities, and work to marshal and coordinate their own capacities. Since we last addressed this Assembly, in August 2011, President Obama issued a presidential directive in which he identified the prevention of mass atrocities and genocide as a core national security interest, as well as a moral responsibility, of the United States. Accordingly, he directed the creation of an Atrocities Prevention Board to coordinate a whole-of-government approach to preventing and responding to genocide and mass atrocities. Ensuring justice and accountability is a key ingredient to resolving and preventing mass violence. Among many other efforts, the Board will work to coordinate and strengthen U.S. and multilateral efforts to prevent atrocities and achieve accountability.

On the same day President Obama announced this new effort, he also issued a Presidential Proclamation restricting entry into the United States of persons who participate in serious human rights and humanitarian law violations. Ensuring there is no safe haven for perpetrators of mass atrocities is key to establishing a mutually reinforcing world-wide network to combat impunity for the most serious crimes.

Third, the cooperation of States with the ICC is particularly crucial in two areas we have highlighted before and wish to stress again today: the protection of victims and witnesses; and the apprehension of those fugitives subject to ICC arrest warrants who currently remain at large.

Witness protection issues are of particular concern to the United States: we cannot ensure accountability for those who commit the most serious crimes unless security and protection are provided to witnesses and judicial officers. Witness protection is not just an ICC issue: it is a rule of law and domestic capacity issue, and a vital component of any successful justice program, domestic or international. Earlier today, Madame President, in collaboration with Denmark and Uganda, we co-hosted a side event to explore gaps and challenges in ensuring protection for victims, witnesses, and judicial officers who are on the front lines of demanding justice for perpetrators of heinous crimes. We hope the discussion will serve to highlight those challenges, help map the way forward—both for the ICC and in the domestic sphere—and encourage the international community to prioritize cooperation on this crucial issue.

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[I]t is a persistent and serious cause for concern that eight individuals who are the subject of existing ICC arrest warrants remain at large. The recent transfer of former President Laurent Gbagbo to The Hague to face charges of crimes against humanity is an important step forward. But the landscape remains challenging. Years after their warrants were issued, the suspects who currently remain at large all too often remain free to continue to commit serious human rights violations, which contributes to the cycle of impunity and persistent instability. The international community must demonstrate its respect for accountability, and should bring diplomatic pressure

to bear on States that would invite or host these individuals. In the past year, for example, the United States has opposed invitations, facilitation, or support for travel by President Bashir of Sudan, who, as you know, is the subject of an outstanding ICC arrest warrant but remains at large and continues to seek to travel across borders.

States can also lend expertise and logistical support to efforts to apprehend these fugitives. Last year in Kampala, the United States pledged to renew its commitments to support regional efforts to bring the leadership of the Lord's Resistance Army to justice, and to protect and assist civilians threatened by the LRA. In connection with this, I am pleased to be able to report that, with the consent of governments in the region, the United States recently sent a small number of U.S. military advisors to the region to assist the forces that are pursuing the LRA and seeking to bring its top commanders to justice. These advisors will not take direct action against the LRA, but will work in support of our regional partners in the field to strengthen information-sharing, enhance coordination and planning, and improve the overall effectiveness of military operations and the protection of civilians. The United States is also committed to working in coordination with the African Union and United Nations in this effort. The deployment of these advisors is part of a broader ongoing strategy to increase the protection of civilians, promote defections from the LRA and support disarmament, demobilization, and reintegration of remaining LRA fighters, and provide continued humanitarian relief to the affected communities. As President Obama has said, "Bringing these senior commanders to justice is a key component of creating a lasting peace in the region." The United States stands by the efforts of regional partners to do just that.

These efforts are part of a larger U.S. government commitment to support international criminal justice in its many forms. We support the continuing important work of the ad hoc tribunals, and look forward to the creation of the Residual Mechanism. We look forward to the successful completion of the important Karadzic, Mladic, and Hadzic cases, which will bring an important element of closure to the tragedy that consumed the Balkans in the 1990s. ...

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2. International Criminal Court

a. Overview

On November 1, 2011, Frank E. Loy, Public Delegate, U.S. Mission to the United Nations, addressed the UN General Assembly in a plenary session following a report by President Song of the ICC. His remarks, available at

<http://usun.state.gov/briefing/statements/2011/176932.htm>, are excerpted below.

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Although the United States is not a party to the Rome Statute, we remain steadfastly committed to promoting the rule of law and to the principle that those responsible for serious violations of human rights and international humanitarian law should be held to account. We will continue to

play a leadership role in righting these wrongs when they have been committed and, in concert with the international community, acting on early warning signs to prevent atrocities from occurring in the first place. We recognize that the International Criminal Court plays a key role in bringing perpetrators of the worst atrocities to justice.

We were pleased to cast our first vote in favor of an ICC referral by the UN Security Council earlier this year, which reflects our continued engagement with the ICC and States Parties to the Rome Statute to end impunity for the worst crimes. Just as we are engaging with States Parties on issues of concern, the Obama Administration also is supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.

We continue to support positive complementarity initiatives by assisting countries in their efforts to develop domestic accountability processes for Rome Statute crimes. The ICC, by its nature, is intended to examine only those accused of bearing the greatest responsibility for the gravest crimes within its jurisdiction and depends on states to complement the ICC's work with national-level prosecutions. In that regard, over the last year we supported efforts by the Government of the Democratic Republic of the Congo to draft legislation establishing specialized mixed courts and will continue to assist efforts to strengthen the capacity and independence of the Congolese judicial system in order to achieve justice for the victims of sexual violence and other grave crimes. We supported a pilot project in the DRC to protect witnesses and judicial officers in sensitive and challenging cases and are expanding this kind of witness-protection support and looking for additional ways to support domestic prosecutions in other countries. Despite the good work that has already been done, important challenges remain. In particular, reparations and coordinated and effective witness and judicial protection remain as key gaps that must be filled. Finally, my delegation's concerns about the amendments adopted last year at Kampala are well-known, and were set forth in last year's debate on this agenda item.

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b. Cote d'Ivoire

On April 12, 2011, President Obama called President Alassane Ouattara to congratulate him on assuming his duties as the democratically elected president of Cote d'Ivoire and to emphasize the importance of accountability for alleged atrocities committed in Cote d'Ivoire, which has accepted the jurisdiction of the International Criminal Court. A readout of the call, available at www.whitehouse.gov/the-press-office/2011/04/12/readout-president-obamas-call-president-ouattara-cote-divoire, is excerpted below.

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President Obama offered support for President Ouattara's efforts to unite Cote d'Ivoire, restart the economy, restore security, and reform the security forces. The President reiterated his admiration for the extraordinary potential of the Ivorian people, and the two leaders discussed the importance of reestablishing normal trade and assistance relationships to jumpstart the Ivorian private sector. The two leaders also reiterated the importance of ensuring that alleged atrocities are investigated and that perpetrators—regardless of which side they supported—are held accountable for their actions, and committed to support the roles of the United Nations commission of inquiry and the International Criminal Court in investigating abuses. President Obama welcomed President Ouattara's commitment to provide security and advance the aspirations of all Ivoirians, and said that the United States will be a strong partner as President Ouattara forms an inclusive government, promotes reunification and reconciliation, and responds to the current humanitarian situation.

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c. *Libya*

The United States and the United Nations took several steps in response to the violent repression of peaceful protests by the regime of Muammar al-Qaddafi beginning in February 2011. Chapter 6 discusses Libya's suspension from the Human Rights Council. Chapter 9 discusses recognition and succession of the new regime in Libya. Chapter 16 discusses the use of sanctions to target the Qaddafi regime. And Chapter 18 discusses the use of force in halting the violence against civilians in Libya. On February 26, 2011, the UN Security Council, acting under Chapter VII, unanimously adopted Resolution 1970 which was co-sponsored by the United States. U.N. Doc S/RES/1970. Among other things, Resolution 1970 referred the situation in Libya since February 15, 2011 to the ICC. This was the first affirmative vote by the United States for a referral to the ICC. On May 4, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, addressed the Security Council following a briefing by ICC Prosecutor Luis Moreno-Ocampo on his progress. Her remarks, available at <http://usun.state.gov/briefing/statements/2011/162531.htm>, are excerpted below.

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Mr. President, this Council unanimously decided in Resolution 1970 to refer the situation in Libya to the Prosecutor of the International Criminal Court. By doing so, the Council reflected the importance that the international community attaches to ensuring that those responsible for the widespread and systematic attacks against the Libyan people are held accountable.

The Prosecutor has highlighted the deeply troubling actions by the Libyan government and its security forces—including incidents in which Qadhafi forces fired at civilians, reports of torture, rape, deportations, enforced disappearances, the use of cluster munitions and heavy weaponry against civilian targets in crowded urban areas, and blocking humanitarian supplies. All of this underscores the gravity of what we are witnessing in Libya today. New reports make clear that the Qadhafi regime continues to directly target civilians. So the need for justice and accountability persists. These reports further underscore the message that we have repeated in

our statements and in our diplomatic efforts: Qadhafi has lost any and all legitimacy to lead Libya.

As the ICC process continues, it is important that the international community remain united in its commitment to protecting civilians and civilian-populated areas under the threat of attack, to ending violence against the Libyan people, and defending the universal rights we all share.

Mr. President, my government welcomes the swift and thorough work the Prosecutor has done. He has said that he plans to submit an application for an arrest warrant in the coming weeks. The specter of ICC prosecution is serious and imminent and should again warn those around Qadhafi about the perils of continuing to tie their fate to his. The Prosecutor has also indicated that further cases may be opened, as would be appropriate against individuals involved in further crimes that might be committed in the days ahead.

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On November 2, 2011, Ambassador Rice delivered remarks at the Security Council following ICC Prosecutor Moreno-Ocampo's second briefing on actions taken pursuant to Resolution 1970. Excerpts follow from those remarks, which are available in full at <http://usun.state.gov/briefing/statements/2011/176588.htm>.

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I would like to begin by thanking the Prosecutor for his informative briefing and for his important contributions to laying the foundation for seeking the justice that Libyans so deserve.

The Security Council's decision to refer the situation in Libya to the Prosecutor reflected the importance that the international community attaches to ensuring accountability for the widespread and systematic attacks against the Libyan people that began in the dark days of February. Resolution 1970, adopted even as atrocities were being perpetrated, represented an historic milestone in the fight against impunity.

Justice and reconciliation efforts will be critical components of a successful transition that allows all of Libyan society to leave behind what has been, in many, many respects, a tragic and bloody past. An effective criminal justice system, with a competent judiciary and safeguards to guarantee humane treatment and due process, is crucial to the future of Libya. The new government must ensure that the rule of law, treatment safeguards, and due process protections are firmly in place.

Helping the Transitional National Council implement its commitments to respect human rights—and to proper detention procedures that meet Libya's international obligations—must be a very high priority. We emphasize the importance of ensuring that the human rights of all in Libya—including former regime officials and detainees—are fully respected during and after this transition period.

The victims of Qadhafi's terrorism and their families in Libya—and also in the United States—now know definitively that the era of Qadhafi's violence has ended. Qadhafi engaged in countless barbaric acts, but this does not and cannot justify the apparently brutal way that he met

his death. We welcome the TNC's announcement of an investigation into Qadhafi's death and will look to it to follow through by undertaking an effective inquiry. Independent and impartial investigations into abuses committed in Libya on both sides are the first step in fulfilling the TNC's commitments to accountability and laying a foundation for a transition that embraces the rule of law. We remain deeply troubled by reports, including those mentioned by the Prosecutor, that sub-Saharan African migrants and others detained in ad hoc jails are being abused. Continued support by the international community, including through the UN Support Mission in Libya, will be vital to helping the Libyan people achieve the future they seek.

We must now move together to support the creation of an inclusive, democratic state in which all Libyans, of all backgrounds, have a future and an opportunity to participate in the rebuilding of their country.

We welcome the Prosecutor's report that the TNC is fully cooperating with his investigation in accordance with Resolution 1970, and we encourage other States in which individuals subject to ICC arrest warrants may be found to ensure that they are brought to justice. We encourage the Prosecutor to continue to consult with the TNC.

We urge the speedy apprehension of Saif al-Islam Qadhafi and of Abdullah al-Senussi, who remain at large in the region. They must be brought to justice in a legitimate process governed by the rule of law. Ensuring justice for those who have endured unspeakable atrocities will be crucial to Libya's ability to emerge from the ashes of dictatorship to become a country in which all of its citizens enjoy the full protection of the rule of law.

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d. Darfur

On December 15, 2011, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the UN for Special Political Affairs, addressed a Security Council meeting on Darfur and the ICC at which Prosecutor Moreno-Ocampo presented his latest report pursuant to UN Security Council Resolution 1593, which referred the situation in Darfur since July 1, 2002, to the ICC. Ambassador DeLaurentis's remarks are excerpted below and are available in full at <http://usun.state.gov/briefing/statements/2011/178938.htm>.

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The United States places a high priority on promoting lasting peace for all of the people of Sudan. Accountability is an essential component for achieving this durable peace, and the absence of it not only harms the people of Darfur, but impedes stability in Sudan.

As this Council confronts the on-going aerial bombardments conducted by Sudanese Armed Forces in Darfur, Southern Kordofan, Blue Nile, and across the border in South Sudan, it is important to reflect on the incomplete nature of justice for crimes committed in Darfur. The need to ensure accountability for those responsible for genocide, war crimes, and crimes against humanity in Darfur is not just a moral imperative but a political one: the lack of accountability

for such actions remains a strong negative precedent that continues to influence the conduct of the parties today.

It is in this spirit that we thank Prosecutor Moreno-Ocampo for his report and briefing to the Council here today. We are deeply concerned by the portions of his report detailing allegations that could be part of “ongoing acts of genocide, war crimes, and crimes against humanity.” In particular, we find deeply disturbing the reports being monitored by the Prosecutor’s office of alleged attacks either targeting or indiscriminately affecting civilians by pro-government forces. These include allegedly indiscriminate shootings in North Darfur IDP camps as well as alleged kidnappings and executions in Abu Zereiga.

Once again, the report highlights the continued presence of children in various forces, including pro-government forces and rebel movements.

Like the Prosecutor, we continue to be concerned by ongoing reports of widespread sexual and gender-based violence in Darfur and of instances of victimization of female IDPs [internally displaced persons] and refugees.

Furthermore, we are troubled by reports of continued attacks on UNAMID, including the six UNAMID peacekeepers killed since the Prosecution’s last report. We urge the Government of Sudan to investigate these attacks, which may amount to war crimes, and prosecute those individuals responsible.

We take note that on December 2 the Prosecutor requested that the ICC Pre-trial Chamber to issue an arrest warrant against Sudanese Defense Minister, Abdelrahim Mohamed Hussein, for his alleged responsibility for crimes against humanity and war crimes committed in Darfur from August 2003-March 2004.

We again remind states of the importance of ending impunity and cooperating fully with the investigations. We continue to call on the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the ICC and its Prosecutor, as required by UN Security Council Resolution 1593 (2005). We are concerned with the continued non-cooperation by the Government of Sudan with these obligations, which is detailed in the Prosecutor’s report.

We also strongly urge the Government of Sudan to uphold its commitments under the Doha Document for Peace in Darfur signed between the Government of Sudan and the Liberation and Justice Movement to ensure accountability. We strongly urge the parties to implement the Doha Document in a full and transparent manner.

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3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Overview

On June 6, 2011, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, addressed the Security Council on the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Ambassador DiCarlo's statement, excerpted below, is available at <http://usun.state.gov/briefing/statements/2011/165103.htm>.

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Mr. President, we open this debate on a day when Ratko Mladic is in The Hague. His capture, arrest, and transfer to the International Criminal Tribunal for the Former Yugoslavia is a milestone on the path to justice and reconciliation. We commend the Government of Serbia for apprehending Mladic, and we welcome President Tadic's statement about his country's commitment to apprehending the final ICTY fugitive, Goran Hadzic. Mladic's capture means that he will now have to answer to victims for his alleged crimes, including the genocide at Srebrenica, Bosnia-Herzegovina in 1995. It puts perpetrators of mass atrocities on notice: they will be held accountable for genocide, war crimes, and crimes against humanity. We expect all UN member states to take the steps necessary to bring to justice those indicted by the Tribunals.

Mr. President, we welcome the steady progress the Tribunals for the former Yugoslavia and Rwanda have made to increase their efficiency. We urge both Tribunals to strive to complete their work at the earliest possible date. We are mindful of the importance of doing so without sacrificing the high standards of a fair trial. We urge the Presidents and the judges who act as managers of the courtrooms to take every measure to ensure that trials and appeals are both expeditious and fair.

These Tribunals and their predecessors have had genuine historical impact. The establishment last December of the International Residual Mechanism for Criminal Tribunals demonstrated that war-crimes fugitives cannot escape justice. The Residual Mechanism will allow for the completion of those functions that will necessarily outlast the Tribunals themselves. Transfers of cases to national jurisdiction have been made possible because States have further developed their judicial and investigative capacities. Programs such as the Joint European and ICTY Training Project for National Prosecutors and Young Professionals are welcome efforts to help build such long-term capacity.

Again, we applaud the Tribunals' work thus far, and we urge them to make the most efficient use of available resources. We also encourage the Tribunals to continue to work with the UN Secretariat and other relevant UN bodies to develop practical and effective methods, including retention measures, to address the staffing shortages and the problems of attrition highlighted in the Prosecutors' reports.

Mr. President, the United States calls on states in the former Yugoslavia to cooperate fully with the ICTY, which is both a legal obligation and a key to Euro-Atlantic integration. We welcome the Government of Croatia's continued strong record of cooperation with the ICTY and its commitment to continue to search for any additional information the Prosecutor requested.

Croatia provided crucial witnesses and documents in the important case against Ante Gotovina and others, which proved critical to the Tribunal's deliberations.

We appreciate Croatia's reaffirmation of its commitment to support the ICTY through the conclusion of its processes.

Let me turn now to the International Criminal Tribunal for Rwanda. The United States welcomes the May 2011 judgment in the case of former chief of staff of the Rwandan army, the former head of the military police, and the two former commanders of the reconnaissance battalion. This case was the second one concluded by the ICTR that involved the responsibility of former senior military officers. It represents an important step for the Rwandan people toward justice and accountability.

The United States also welcomes the recent apprehension of the fugitive Bernard Munyagishari in the Democratic Republic of Congo. We urge all states to cooperate fully with the ICTR in their efforts to locate and apprehend fugitives. We commend those countries that are cooperating with the ICTR to bring the remaining nine fugitives to justice. We encourage continued progress so that these fugitives can be swiftly arrested.

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On December 7, 2011, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative for Special Political Affairs, U.S. Mission to the United Nations, addressed the Security Council on the ICTY and the ICTR. Ambassador DeLaurentis's statement, excerpted below, is available at <http://usun.state.gov/briefing/statements/2011/178480.htm>.

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Mr. President, since we last addressed the Council on the Tribunals, shortly after the arrest of Ratko Mladic, the last remaining fugitive under ICTY indictment—Goran Hadzic—was captured. We mark their capture, arrest, and transfer as one step—albeit a significant one—on the path to justice and reconciliation. But we understand that this is only one step on a long road to peace and justice.

Even as the ICTY is completing its mandate, and even as we look forward to the start of the Residual Mechanism, the ICTY is extremely busy, with proceedings in 15 cases against 35 persons. We are confident that President Meron and the Tribunal as a whole can meet the challenge of concluding those trials fairly and efficiently, while also coordinating the transfer of key functions from the Tribunal to the Residual Mechanism.

The ICTY recently held a conference to discuss what kind of legacy it is leaving for future generations. Among other things, the ICTY has shown that the international community can establish an effective judicial institution that will bring to justice those who perpetrate atrocities. The ICTY has in large part been a success because of the hard day-to-day work of its judges, prosecutors and staff, who are committed to their core mission of being an effective court and dispensing justice. The ICTY has shown that it can provide fair trials, that war crimes fugitives cannot escape justice, and that victims can now expect that those who commit crimes against civilians will be held to account.

Again, we note with appreciation the progress the Tribunal has made in ensuring that its procedures are both expeditious and fair—including doubling-up on staff and judges such that they work on more than one trial at a time. We note with appreciation the measures President Meron has outlined here today, and welcome his continued efforts to improve the work of the Tribunal.

Mr. President, the United States continues to call on states in the former Yugoslavia to cooperate fully with the ICTY. We encourage the Government of Serbia to continue its efforts to determine how Ratko Mladic and Goran Hadzic were able to avoid justice for so many years, and to take appropriate measures against their support networks. We also look forward to cooperation from the relevant countries in the region on the apprehension of Radovan Stankovic, who escaped in 2007 from prison in Bosnia and Herzegovina. In addition, we note the Government of Croatia's record of cooperation with the ICTY, and urge it to work to support the ICTY and continue to cooperate with the Prosecution.

Turning to the International Criminal Tribunal for Rwanda, the United States welcomes the June 24, 2011 judgment in the case against the former Minister of Women's Development and five others. The conviction of the former Minister of Women's Development is a significant milestone because it demonstrates that rape is a crime of violence that has been used as a tool of war by both men and women. The United States also welcomes the November 17, 2011 judgment in the case against the former Mayor of Kivumu, who had authority over the local police, yet failed to prevent the massacre of more than 1,500 people.

When we last addressed these issues in the Council in June, the United States welcomed the then-recent apprehension of fugitive Bernard Munyagishari in the Democratic Republic of the Congo. Now, 198 days after his arrest, the United States is discouraged that the nine remaining fugitives remain at large. Ensuring completion of the work of the Tribunal and smooth and efficient transition to the Residual Mechanism is not only the work of the Tribunal. Every member state has an obligation to apprehend the remaining fugitives. The United States, along with many others, is making a concerted effort to assist other nations in bringing these fugitives to justice. We ask all states to redouble their efforts and cooperate fully with the ICTR to locate and apprehend the remaining fugitives.

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b. International Criminal Tribunal for the Former Yugoslavia

(1) Arrests

As mentioned in the statements of Ambassadors DiCarlo and DeLaurentis above, several key arrests of suspects sought by the ICTY were made in 2011. On May 26, 2011, President Barack Obama issued a statement on the arrest of Ratko Mladic. Daily Comp. Pres. Docs. 2011 Doc. No. 00396 (May 26, 2011), p. 1. He said:

Fifteen years ago, Ratko Mladic ordered the systematic execution of some 8,000 unarmed men and boys in Srebrenica. Today he is behind bars. I applaud President Tadic and the Government of Serbia on their determined efforts to ensure that Mladic was found and that he faces justice. We look forward to his expeditious transfer to The Hague.

Today is an important day for the families of Mladic's many victims, for Serbia, for Bosnia, for the United States, and for international justice. While we will never be able to bring back those who were murdered, Mladic will now have to answer to his victims and the world in a court of law. From Nuremberg to the present, the United States has long viewed justice for war crimes, crimes against humanity, and genocide as both a moral imperative and an essential element of stability and peace. In Bosnia, the United States—our troops and our diplomats—led the international effort to end ethnic cleansing and bring a lasting peace. On this important day, we recommit ourselves to supporting ongoing reconciliation efforts in the Balkans and to working to prevent future atrocities. Those who have committed crimes against humanity and genocide will not escape judgment.

Secretary Clinton also issued a statement to the press welcoming the arrest of Mladic. In her statement, available at www.state.gov/secretary/rm/2011/05/164353.htm, Secretary Clinton, added:

...we also send our deepest sympathies and extend our thoughts and prayers to all those who have suffered from the notorious acts charged to Mladic, particularly the genocide at Srebrenica in 1995. You have waited far too long for this day. This arrest cannot restore what you have forever lost, but we hope it will provide some comfort that this criminal is now behind bars.

Both the White House and Secretary Clinton similarly issued statements welcoming the arrest in July 2011 of Goran Hadzic, the final remaining fugitive indicted for atrocities by the ICTY. The White House statement, released July 20, 2011, is available at www.whitehouse.gov/the-press-office/2011/07/20/corrected-statement-press-secretary-arrest-goran-hadzic. It included the following:

We hope that Goran Hadzic's arrest, coming less than two months after the arrest of fellow indictee Ratko Mladic, can bring some much needed closure to the victims of the crimes committed in Croatia, and their families, and elsewhere in the region. It also serves as yet another reminder to those around the world who carry out terrible crimes that their day, too, will come.

Over the course of its 18-year history, the United States has been and remains a steadfast supporter of the ICTY and its critically important work. The arrests of Mladic and now Hadzic, the final two fugitives out of 161 individuals indicted by the court, will allow the ICTY, and the many professionals who have worked in its chambers, to finally complete their mandate on behalf of the victims and in pursuit of justice.

Secretary Clinton's statement similarly welcomed the arrest, thanked Serbian authorities, looked forward to Hadzic's transfer to The Hague for trial, and pointed out that none of the 161 individuals indicted by the ICTY had evaded justice. Her statement is available at www.state.gov/secretary/rm/2011/07/168903.htm.

(2) Amendments to United States Agreement on Arrest and Surrender

On July 5, 2011, the United States notified the ICTY that it had completed all domestic legal requirements for entry into force of certain amendments to the Agreement on Surrender of Persons between the U.S. and the ICTY, signed at The Hague on October 5, 1994. The Agreement, as amended on July 5, 2011, is available at [http://www.icty.org/x/file/Legal%20Library/Member States Cooperation/implementation/legislation/united states 1994 en.pdf](http://www.icty.org/x/file/Legal%20Library/Member%20States%20Cooperation/implementation/legislation/united%20states%201994%20en.pdf). In November 2009, the United States proposed the amendments to include as extraditable offenses contempt of the Tribunal, false testimony under solemn declaration, and other offenses relating to the obstruction or interference with the administration of justice when such offenses are based on conduct subject to punishment by deprivation of liberty of more than a year if committed in the United States. On June 16, 2011, the ICTY replied by diplomatic note, accepting the proposed amendments and acknowledging that the amendments would enter into force upon notification from the United States that its domestic legal requirements had been met. Accordingly, the amendments entered into force with that notification on July 5, 2011.

(3) United States response to requests for documents by Radovan Karadzic

The United States filed several responses to the Trial Chamber in 2011 related to motions by Radovan Karadzic seeking orders for production of documents. In its January 10, 2011 filing relating to a request for certain documents, the United States emphasized that it had been cooperating with the “Accused’s shifting and burdensome request” for documents and that the Trial Chamber need not involve itself in the process and should, accordingly, dismiss the motion. See Response of the United States of America to the Trial Chamber’s 17 December 2010 Invitation to the United States of America, January 10, 2011, available at www.state.gov/s/l/c8183.htm.

Similarly, in its February 11, 2011 filing, the United States argued that the Trial Chamber should dismiss another motion by Karadzic because the United States was fully cooperating and keeping counsel informed of its efforts to provide documents in response to Karadzic’s requests. The excerpt below from the February 11, 2011 U.S. response comprises the United States argument for dismissing the motion (with footnotes omitted). The U.S. response is available in full at www.state.gov/s/l/c8183.htm.

* * * *

The Appeals Chamber has held that binding orders against States are to “be reserved for cases in which they are really necessary.” This is not one of those cases. In fact, Accused has failed to satisfy the threshold requirement that such a motion can only be filed *after* a State has declined to lend the requested support. Far from declining to lend support, the United States has gone to extraordinary efforts since first receiving Accused’s information request to locate, to declassify as necessary, and to provide potentially responsive material. That lengthy and onerous process of cooperation, which has resulted in the transfer of hundreds of pages of documents, and which

involved significant back-and-forth, is nearly at an end: Only a single potentially responsive document remains in the balance.

The United States has explained to Accused the status of this final document, and the requirement for review by a third party. Third-party review is essential, since the document contains material classified by that third party for the protection of its security interest. We have also recently been made aware that the material may contain some classified material that potentially belongs to a fourth party. The United States is not in a position unilaterally to declassify sensitive materials that it does not own and that it did not originate—nor can or should it be compelled to do so.

In light of these circumstances, Accused's motion is without foundation. His impatience to receive this final material does not constitute an appropriate basis for the issuance of a *54bis* order. That said, we understand that the third party is making efforts to complete its review as soon as possible, and we can assure the Court that when it does so, we will respond promptly to Accused. We have also contacted the potential fourth party to request an expedited review.

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On February 7, 2011, the Trial Chamber issued its decision denying the Accused's motion for a binding order. The Trial Chamber's decision is excerpted below (with footnotes omitted) and available in full at www.state.gov/s/l/c8183.htm.

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6. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely: (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of documents; (ii) the requested documents must be “relevant to any matter in issue” and “necessary for a fair determination of that matter” before a Chamber can issue an order for their production; (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily; and (iv) the request cannot be unduly onerous upon the state.

7. With respect to (iii) above, the applicant cannot request an order for the production of documents without having first approached the state said to possess them. Rule 54 *bis* (A) (iii) requires the applicant to explain the steps that have been taken to secure the state's co-operation. The implicit obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, the applicant made a reasonable effort to persuade the state to provide the requested information voluntarily. Thus, only after a state declines to lend the requested support should a party make a request for a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.

8. As stated above, binding orders can be issued only after the applicant has made reasonable efforts to persuade the state concerned to provide the requested information voluntarily, and then the state has refused to do so. In the present circumstances, the Chamber is satisfied that the U.S. has continuously cooperated with the Accused's requests since his original binding order motion of 11 September 2009. The Accused even submits that during the past year, the U.S. has been working diligently to resolve the issues relating to his numerous requests

and the process has resulted in the production of “218 documents by the United States and the withdrawal or narrowing of many of Dr. Karadzic’s requests.”

9. For this particular request, the U.S. notified the Accused that it found a potentially relevant document and is currently waiting for security clearance from the “third” and potentially “fourth party.” The U.S. submits that as soon as it receives responses from these parties, it will notify the Accused accordingly. The Chamber trusts that the U.S. will continue its diligent efforts to resolve this matter directly with the Accused as quickly as possible. Given that the U.S. is co-operating with the Accused for the production of the requested documents, and that it is in the interests of all parties involved that requests for documents are, if possible, dealt with on a voluntary basis, the Chamber considers that the Accused’s Motion must fail on this basis alone.

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The United States produced the only remaining potentially relevant document discussed in the order above on April 11, 2011. The next day, on April 12, Karadzic filed another motion for a binding order for the United States to produce the requested material. The United States responded at the Trial Chamber’s invitation with a filing on April 28, 2011, excerpted below and available in full at www.state.gov/s/l/c8183.htm. In its response, the United States requested that the motion be dismissed, observing that it was frivolous and vexatious and mischaracterized U.S. Congressional reports relating to alleged arms shipments to Tuzla in 1995, one of the subjects about which Kardzic had requested materials.

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The Appeals Chamber has made clear that binding orders against States are exceptional measures for dealing with uncooperative States, should be “strictly justified by the exigencies of the trial,” and should be “reserved for cases in which they are really necessary.” This is patently not one of those cases.

Accused has failed to satisfy the threshold requirement that a 54*bis* motion can only be filed *after* a State has declined to lend the requested support. Far from declining to lend support, the United States has gone to extraordinary efforts since receiving Accused’s information request. It has made diligent searches of its relevant holdings. It has declassified material as necessary, and coordinated with third-party originators as appropriate. The United States has now provided to Accused all the potentially responsive documents it has located I response to his lengthy information request, including all the potentially responsive documents it has found on the alleged Tuzla flights, and it has more than once informed Accused of that fact.

Accused’s Motion seeks to cast doubt on these good-faith representations of the United States. It asks the Trial Chamber to order the United States to produce the allegedly missing material, or, in the alternative, to require the United States to produce affidavits affirming that it cannot locate it.

Accused’s request, however, is without foundation. Indeed, his Motion has mischaracterized materials the United States has provided to him. As a result, the Motion asks the Chamber to issue a binding order against the United States for alleged “missing reports” that

it is not clear were ever created, to substantiate events that appear never to have occurred, in order to establish the identity of those responsible for those non-events.

The United States stands by the assertions it made in its February 11 filing with the Court regarding the searches it has made in regard to this document request. Nevertheless, in order to assist the Trial Chamber, the United States has attached a further statement regarding the searches it has made. The Statement makes clear that the United States has cooperated fully on this request.

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c. International Criminal Tribunal for Rwanda

On June 24, 2011 the ICTR handed down several convictions, including one against the former Minister of Women's Development in Rwanda, Pauline Nyiramasuhuko, on charges of genocide and rape as a crime against humanity, among other crimes. A June 25, 2011 State Department Press Statement, available at www.state.gov/r/pa/prs/ps/2011/06/167079.htm, highlighted the significance of the convictions:

The United States welcomes the June 24 International Criminal Tribunal for Rwanda (ICTR) conviction of Pauline Nyiramasuhuko, former Rwandan Minister of Women's Development and her son, Arsene Shalom Ntahobali, both of whom were convicted for genocide and rape as a crime against humanity, among other crimes. The court also convicted former civilian officials Sylvain Nsabimana, Joseph Kanyabashi and Élie Ndayambaje and former Lt. Colonel Alphonse Nteziryayo, as part of the same indictment. The court sentenced Nyiramasuhuko, Ntahobali and Ndayambaje to life imprisonment, and Kanyabashi, Nteziryayo and Nsabimana to 35, 30 and 25 years respectively.

This ruling is an important step in providing justice and accountability for the Rwandan people and the international community. This conviction is a significant milestone because it demonstrates that rape is a crime of violence and it can be used as a tool of war by both men and women. Nyiramasuhuko was convicted for her role in aiding and abetting rapes and for her responsibility as a superior who ordered rapes committed by members of the Interahamwe militia.

There are still nine ICTR fugitives at-large and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously arrested and brought to justice.

Later, in November 2011, the ICTR rendered its judgment against the former mayor of the Rwandan town of Kivumu. A November 18, 2011 State Department Press Statement, available at www.state.gov/r/pa/prs/ps/2011/11/177351.htm, explained:

Yesterday the International Criminal Tribunal for Rwanda (ICTR) convicted Gregoire Ndahimana, former Rwandan Mayor of Kivumu, for genocide and crimes against humanity. The court sentenced Ndahimana to 15 years.

The United States welcomes this ruling as an important step in providing justice and accountability for the Rwandan people and the international community. The conviction of Mr. Ndahimana is of particular significance, because as mayor of Kivumu he had authority over the police, and yet failed to prevent the massacre of more than 1,500 people who sought refuge and protection in Nyange Church. Militia, police, civil and religious authorities participated in bulldozing the church, burying the refugees sheltered inside.

There are still nine ICTR fugitives at-large and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously arrested and brought to justice.

Finally, on December 21, 2011, the ICTR convicted the former president and vice president of the National Republican Movement for Democracy and Development ("MRND") on charges of conspiracy to commit genocide, among other charges. In a December 27, 2011 State Department Press Statement, available at www.state.gov/r/pa/prs/ps/2011/12/179717.htm, the United States also welcomed the issuance of these judgments:

On December 21, 2011, the International Criminal Tribunal for Rwanda (ICTR) convicted Mathieu Ndirumutse, former National Republican Movement for Democracy and Development (MRND) President, and Edouard Karemera, former Minister of Interior and former MRND Vice President, on charges of conspiracy to commit genocide, direct and public incitement of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II. Due to their role in a joint criminal enterprise "to destroy the Tutsi population," the Trial Chamber found Ndirumutse and Karemera responsible not only for their own criminal acts, but also for the criminal acts committed by others as part of that enterprise, including widespread rape and sexual assault against Tutsi women and girls. The court sentenced Ndirumutse and Karemera to life in prison. Co-defendant Joseph Nzirorera, former Secretary General of the MRND, passed away July 1, 2010.

The United States welcomes this ruling as an important step in providing justice and accountability for the Rwandan people and the international community. The defendants were among the leadership of the dominant party in the interim government, the same party that established the Interahamwe militia, which played a leading role in the 1994 genocide.

There are still nine ICTR fugitives at-large, and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously arrested and brought to justice.

4. Special Tribunal for Lebanon

On January 17, 2011, the Office of the Prosecutor for the Special Tribunal for Lebanon filed an indictment relating to the assassination of former Prime Minister Rafiq Hariri and 22 others. Both Secretary Clinton and President Obama issued statements welcoming the issuance of the indictment. Secretary Clinton's January 17, 2011 statement is available at www.state.gov/secretary/rm/2011/01/154713.htm. She said:

Today's action by the Prosecutor for the Special Tribunal for Lebanon is an important step toward justice and ending impunity for murder. Those who oppose the Tribunal seek to create a false choice between justice and stability in Lebanon; we reject this.

We are confident that the Tribunal will continue to operate according to the highest standards of judicial independence and integrity. We call on all parties to promote calm and continue to respect the Tribunal as it carries out its duties in a professional and apolitical manner.

The United States and all friends of Lebanon stand together in support of its sovereignty and independence. While great progress has been made since this deadly attack in 2005, it will be impossible to achieve the peace and stability that the people of Lebanon deserve unless and until the era of impunity for political assassinations in Lebanon is brought to an end.

The January 17, 2011 White House Statement, Daily Comp. Pres. Docs. 2011 Doc. No. 00030, p. 1, similarly welcomed the issuance of the indictment and called for continued progress by the Tribunal:

I welcome the announcement by the Office of the Prosecutor for the Special Tribunal for Lebanon today that he has filed an indictment relating to the assassination of former Prime Minister Rafiq Hariri and 22 others. This action represents an important step toward ending the era of impunity for murder in Lebanon, and achieving justice for the Lebanese people. I know that this is a significant and emotional time for the Lebanese people, and we join the international community in calling on all Lebanese leaders and factions to preserve calm and exercise restraint. The United States is a strong friend of Lebanon and we stand steadfastly with others in support of Lebanese sovereignty, independence, and stability.

The Special Tribunal for Lebanon must be allowed to continue its work, free from interference and coercion. That is the way to advance the search for the truth, the cause of justice, and the future of Lebanon. Those who have tried to manufacture a crisis and force a choice between justice or stability in Lebanon are offering a false choice, as the Lebanese people have a right to both justice and stability, and efforts to undercut the STL only legitimize its efforts and suggest its opponents have something to hide. Any

attempt to fuel tensions and instability, in Lebanon or in the region, will only undermine the very freedom and aspirations that the Lebanese people seek and that so many nations support. At this critical moment, all friends of Lebanon must stand with the people of Lebanon.

In July 2011, Secretary Clinton issued another statement calling attention to the importance of the confirmation of the indictments by the Special Tribunal for Lebanon. Her July 1, 2011 statement is available at www.state.gov/secretary/rm/2011/07/167488.htm and appears below:

The United States congratulates the Special Tribunal for its hard work on completing this important step. We understand that this is an emotional and significant period for all involved, and we call on all parties to promote calm and continue to respect the Special Tribunal as it carries out its duties in a professional and apolitical manner.

The confirmation of the indictments by the pre-trial judge and their delivery by the Special Tribunal to the Lebanese authorities is an important milestone toward justice and ending a period of impunity for political violence in Lebanon. We call on the Government of Lebanon to continue to meet its obligations under international law to support the Special Tribunal.

The Special Tribunal is an independent judicial entity, established by an agreement between the Lebanese Government and the United Nations in response to a very difficult time in Lebanon's history. Its work is legitimate and necessary. It represents a chance for Lebanon to move beyond its long history of political violence and to achieve the future of peace and stability that the Lebanese people deserve. Those who oppose the Special Tribunal seek to create a false choice between justice and stability. Lebanon, like any country, needs and deserves both.

5. Khmer Rouge Tribunal ("ECCC")

In 2011, the United States continued to support the work of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), also known as the Khmer Rouge Tribunal. On June 27, 2011, Ambassador Rapp traveled to Cambodia for the beginning of the trial in Case 002. His remarks delivered in Phnom Penh are available at www.state.gov/j/qc/us_releases/remarks/167209.htm. Ambassador Rapp stated:

It's great to be here for the beginning of this trial, to see it starting; this is at this time the most important trial in the world. It involves four people who were in the leadership of a government allegedly responsible for murdering 25 percent of their population, almost two million victims. It really is a case of tremendous importance to this country, because this crime affected everybody here, an effort to take this country back to year zero, and people not knowing exactly what happened, why it happened, and how it happened and I think this case will help answer these questions.

I think that for the Cambodian society, it's extremely important, and then for the world, it's important. After Nuremberg, for 45 years there really wasn't any international justice, and it began again in the former Yugoslavia, and now we have a situation where whenever there are atrocities against civilians, people say there's got to be accountability and when cases like this happen, when (Ratko) Mladic is brought in even 15 years after Srebrenica, it's a message to others who might commit similar crimes, that there are going to be consequences. That it may not happen tomorrow or the next day, but eventually, you'll be in the dock as well.

On July 29, 2011, Deputy Secretary of State Thomas R. Nides certified that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the ECCC. 76 Fed. Reg. 50,808 (Aug. 16, 2011). Deputy Secretary Nides provided the certification pursuant to Section 7071(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010. See *Digest 2010* at 145 for background on the certification requirement.

On October 14, 2011, the United States announced the delivery of additional U.S. funding to support the ECCC. The announcement, available at www.state.gov/j/qc/us_releases/other/175540.htm, also summarized recent activity at the ECCC, as set forth below.

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Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, announced today the delivery of \$1.65 million to support the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal. This is the first of three installments of a projected contribution of \$5 million during the current fiscal year to fund the international portion of the tribunal's staff and operations.

This donation comes as the ECCC begins the trial of its Case 002 in which the most senior surviving members of the Khmer Rouge government stand accused of crimes that resulted in the deaths of 1.9 million people between 1975 and 1979. "Given the gravity of the alleged crimes and the level of defendants, this is now the most important trial in the world," said Ambassador Rapp.

The ECCC Trial Chamber began hearings on legal and procedural issues in the trial of Case 002 in June 2011. It is expected to begin hearing witness testimony in November 2011. In July 2010 it rendered judgment in Case 001, finding Kaing Guek Eav, a/k/a Duch, guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions, and sentenced him to 35 years in prison. Among other crimes for which he was convicted, Duch acknowledged involvement in the executions of over 12,000 prisoners. Both Duch and the prosecution have appealed the trial judgment and the Supreme Court Chamber is expected to render its decision in December 2011.* The International Co-Prosecutor has requested investigations of five additional suspects, and proceedings in these matters, known as Cases 003 and 004, are before the Co-

* Editor's note: The Supreme Court Chamber issued its judgment on February 3, 2012, which, *inter alia*, changed Duch's sentence to life imprisonment.

Investigative Judges and Pre-Trial Chamber.

“The United States has been a strong supporter of efforts to bring to justice senior leaders and those most responsible for the atrocities committed under the Khmer Rouge regime in Cambodia,” said Ambassador Rapp. “For the sake of the victims of these crimes, it is essential that proceedings in all matters over which that tribunal has jurisdiction be conducted fairly, expeditiously, and independently.” The United States calls upon all interested parties to publicly re-affirm their support for the Tribunal’s independence and judicial integrity, free from outside interference of any kind.

The U.S. contributed almost \$2 million to the ECCC in fiscal year 2008 funding and \$5 million in fiscal year 2010 funding. The installment announced today is a part of the projected \$5 million in fiscal year 2011 funding.

* * * *

Cross References

Crimes committed against women in conflict zones, **Chapter 6.B.2.c.**

Iran designated as jurisdiction of primary money laundering concern, **Chapter 16.A.2.b.(1)(ii)**

Sanctions for transnational criminal organizations, **Chapter 16.A.7**

Atrocities prevention, **Chapter 17.C.1.**

U.S. policy against transferring detainees to countries where it is determined they are more likely than not to be tortured, **Chapter 18.A.3.c.(2)**

Chapter 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION

1. Reservations to Treaties

On June 29, 2011, the U.S. Mission to the United Nations conveyed via two separate letters to the Secretary-General of the United Nations the U.S. objections to Pakistan's reservations to the International Covenant on Civil and Political Rights ("ICCPR") and its objections to Pakistan's reservations to the Convention Against Torture ("CAT"). In both cases, the U.S. expressed its view that the totality of Pakistan's reservations was inconsistent with the object and purpose of each treaty. The U.S. objections to Pakistan's reservations to the ICCPR and the U.S. objections to Pakistan's reservations to the CAT are reprinted below and the letters conveying these objections to the Secretary-General are available at www.state.gov/s/l/c8183.htm.

* * * *

The Government of the United States of America objects to Pakistan's reservations to the ICCPR. Pakistan has reserved to Articles 3, 6, 7, 12, 13, 18, 19, and 25 of the Covenant, which address the equal right of men and women to the full enjoyment of civil and political rights, the right to life, protections from torture and other cruel inhuman or degrading treatment or punishment, freedom of movement, expulsion of aliens, the freedoms of thought, conscious and religion, the freedom of expression, and the right to take part in political affairs. Pakistan has also reserved to Article 40, which provides for a process whereby States Parties submit periodic reports on their implementation of the Covenant when so requested by the Human Rights Committee (HRC). These reservations raise serious concerns because they both obscure the extent to which Pakistan intends to modify its substantive obligations under the Covenant and also foreclose the ability of other Parties to evaluate Pakistan's implementation through periodic reporting. As a result, the United States considers the totality of Pakistan's reservations to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan's reservations.

* * * *

The Government of the United States of America objects to Pakistan's reservations to the CAT. Pakistan has reserved to Articles 3, 4, 6, 12, 13, and 16 of the Convention, which address non-refoulement, criminalization of acts which constitute torture, arrest or apprehension of those suspected of committing torture, investigation of credible allegations of torture, the right to bring before and have examined by competent authorities allegations of torture and for

protection of complainants and witnesses, and the prevention of cruel, inhuman or degrading treatment or punishment. At the same time, Pakistan has chosen not to participate in the Committee's inquiry process under Article 20. The combination of Pakistan's reservations and its decision not to participate in the Article 20 process raises serious concerns because the reservations obscure the extent to which Pakistan intends to modify its substantive obligations under the Convention, and preclude further inquiry by the Committee if well-founded indications of systematic torture do arise. As a result, the United States considers the totality of Pakistan's reservations to Articles 3, 4, 6, 12, 13, and 16 to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan's reservations.

* * * *

2. The Anti-Counterfeiting Trade Agreement

On October 1, 2011, the United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore signed the Anti-Counterfeiting Trade Agreement ("ACTA") in Tokyo. For more information and the text of the agreement, see www.ustr.gov/acta. In a letter to President Obama dated October 12, 2011, U.S. Senator Ron Wyden questioned the authority of the executive branch to enter into the ACTA without further action by Congress. United States Trade Representative Ron Kirk responded to Senator Wyden in a letter dated December 7, 2011. Ambassador Kirk's letter is set forth below. Both Senator Wyden's October 12 letter and Ambassador Kirk's December 7 response are available at www.state.gov/s/l/c8183.htm.^{*}

* * * *

Thank you for your letter regarding the Anti-Counterfeiting Trade Agreement (ACTA). The President has asked me to reply on his behalf.

The ACTA represents a crucial advance in the international fight against counterfeiting and piracy. The Agreement will support and promote American jobs in our innovative and creative industries by helping to protect them against the global proliferation of intellectual property theft. In addition to calling for ACTA governments to adopt strong enforcement regimes like that of the United States for combating trademark counterfeiting and copyright piracy, the ACTA includes innovative provisions to deepen international cooperation in protecting intellectual property rights and to promote sound enforcement practices.

The ACTA is the product of close collaboration between the Administration and Congress as well as intensive consultations with U.S. industry and nongovernmental organizations. Over the course of the negotiations, USTR staff held dozens of ACTA-related

^{*} Editor's note: In a letter to U.S. State Department Legal Adviser Harold H. Koh dated January 5, 2012, Senator Wyden requested the State Department's legal opinion on the constitutionality of the executive branch entering into ACTA without further Congressional action. The response to that letter will be discussed in *Digest 2012*.

meetings and conference calls with Congressional staff, including staff of your office. We used those meetings and calls to apprise Congress of proposed U.S. negotiating positions, keep Members abreast of developments and solicit their views. We responded to advice that you and other Members provided, for example, by making the ACTA negotiations more transparent and by ensuring that certain provisions were not included in the Agreement. Your advice and that of other Members helped to improve the final product and ensure that the ACTA reflects Congressional perspectives.

As noted, USTR also pursued extensive public engagement in connection with the ACTA. USTR's efforts were recognized even by stakeholders who had earlier expressed concerns about the proposed agreement. For example, the Consumer Electronics Association commended USTR for taking into consideration the comments of many U.S. stakeholders, stating that the changes reflected in the final draft "eliminated most of the provisions of greatest concern to our industry." The Computer and Communications Industry Association expressed appreciation for USTR's efforts to respond to concerns of U.S. internet and technology firms, stating that "[a]s CCIA presently interprets ACTA, it does not conflict with U.S. domestic law."

U.S. negotiators were careful to ensure that the ACTA is fully consistent with U.S. law. For that reason, Congress will not need to enact legislation in order for the United States to implement the Agreement. Nor will Congress need to take any other action before the Agreement enters into force for the United States. In this respect, the ACTA is similar to a long line of trade-related agreements that this and earlier Administrations have concluded and that have entered into force without further Congressional action. The Clinton Administration, for example, entered into and implemented intellectual property rights agreements with Trinidad and Tobago, Jamaica, Ecuador, Hungary and Nicaragua, among others, with broad, substantive patent, trademark, and copyright obligations applicable to the United States and the other parties. Like the ACTA, each of those agreements was drafted to reflect U.S. law and entered into force without further action by Congress. I would also draw your attention to the following additional examples—a few among many—of U.S. trade agreements that have been concluded and carried out without submission to the Congress for approval:

- A June 2011 agreement providing for Mexico to lift its retaliatory import duties on U.S. products (such as wine, Christmas trees, and paper products).
- A May 2011 agreement with Mexico on mutual recognition of testing procedures for telecommunications equipment.
- A May 2009 agreement with the European Union on trade in beef.
- A December 2001 multi-party agreement on winemaking practices.
- A March 1994 agreement with the European Union providing for mutual recognition of traditional names for distilled spirits.

You will find a comprehensive list of U.S. trade agreements concluded over recent decades in the appendix to the President's annual report to Congress on the trade agreements program. A large number of these agreements required no implementing legislation and were brought into force by the President without further action by Congress. We expect to implement the ACTA in the same manner, consistent with longstanding practice in the trade area.

I appreciate your interest in the ACTA and look forward to continuing work with you to help support and promote our innovative and creative industries.

* * * *

B. OTHER ISSUES

1. Constitutionality of U.S. Statute Enacting the Chemical Weapons Convention

In 2011, the United States filed a supplemental brief and a supplemental reply brief in the U.S. Court of Appeals for the Third Circuit in an appeal brought by a defendant who was convicted under the U.S. statute enacted to implement U.S. obligations under the Chemical Weapons Convention, 18 U.S.C. § 229-229F. *United States v. Carol Anne Bond*, No. 08-2677 (3d Cir. 2011). The district court had denied defendant Carol Anne Bond's motion to dismiss chemical weapons charges on the basis that the statute was not a valid exercise of federal authority under the U.S. Constitution. After Bond was convicted, she appealed, renewing arguments that 18 U.S.C. § 229 was unconstitutional.

In its September 16, 2011 supplemental brief, the United States argued that the Chemical Weapons statute was a valid exercise of both the Commerce Clause and Treaty Power of the Constitution. The second section of the brief, discussing the Treaty Power as a basis for enacting the Chemical Weapons Statute, is excerpted below with most footnotes and citations to the record omitted. The full text of the brief is available at www.state.gov/s/l/c8183.htm.

* * * *

To the extent the Court finds it appropriate to reach the issue, the district court was correct in dismissing Bond's constitutional challenge to 18 U.S.C. § 229(a)(1) on the basis that the legislation was a valid exercise of Congress's authority to implement treaties under the Necessary and Proper Clause.

1. The Constitution empowers the President, "by and with the Advice and Consent of the Senate, to make Treaties" U.S. Const. art. II, § 2. That power "is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations." *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); see also *Geofroy*, 133 U.S. at 267 ("it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country"). Indeed, "States may enter into an agreement on any matter of concern to them, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on any subject suggested by its national interests in relations with other nations." *United States v. Lue*, 134 F.3d 79, 83 (2d Cir. 1998) (citation omitted) (finding that the International Convention Against the Taking of Hostages ("Hostage Taking Convention"), T.I.A.S. No. 11,081 (Dec. 17, 1979), was well within the scope of the treaty-making power); Restatement (Third) of For. Rel., sec. 302, cmt. c.

The Chemical Weapons Convention falls well within that authority. Foreclosing "for the sake of all mankind" the "possibility of the use of chemical weapons" and promoting international cooperation in the field of chemical activities are objectives for which international action is obviously appropriate. Chemical Weapons Convention, pmbl. 6, 9. Further,

proliferation concerns are certainly “a matter of grave concern to the international community.” *Lue*, 184 F.3d at 83. In short, the threat that chemical weapons present to the safety and other interests of American citizens presents a foreign policy matter expressly assigned by the Constitution to the Executive under its treaty-making power.

* * * *

As a party to the Chemical Weapons Convention, the United States undertook specific obligations in support of the Convention’s broad objective “to exclude completely the possibility of the use of chemical weapons, through the implementation of [its] provisions.” Chemical Weapons Convention, pmbl. ¶ 6. Achieving that goal requires preventing both states and non-state actors from developing, producing, and using chemical weapons, as the Convention makes clear. In addition to the prohibitions on state action found in Article I, Section 1 of the Convention, Article VII, Section 1 of the Convention requires that

[e]ach State Party shall . . . adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

- (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction . . . from undertaking any activity prohibited to a State Party under this Convention including enacting penal legislation with respect to such activity;
- (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
- (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

Thus, the signatories viewed prohibiting both natural and legal persons from undertaking activities prohibited to a State Party as a “necessary measure” to implement their obligations under the Convention. Chemical Weapons Convention, art. VII.

These types of provisions are also common in international agreements that seek to limit or eradicate the use of certain types of weapons, and fall squarely within the Treaty Power. *See, e.g.*, Biological Weapons Convention, art. IV (requiring each signatory to “take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and other means of delivery specified [in the Convention] within the territory of such State, under its jurisdiction or under its control anywhere”); Mines Protocol, art. 14 (requiring each signatory to “take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control”).

2. To fulfill its obligations under the Chemical Weapons Convention, the United States Congress enacted implementing legislation—including 18 U.S.C. § 229(a)(1)—that closely tracks the requirements of Article VII of the Convention. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-2856. Congress had full authority under the Necessary and Proper Clause to do so. As the Supreme Court explained in *Missouri v. Holland*, 252 U.S. 416 (1920), “[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.” *Id.* at 432; *accord United States v. Belfast*, 611 F.3d 783, 805-06 (11th Cir. 2010) (holding, on the basis of *Holland*, that the Torture Act, 18 U.S.C.

§§ 2340-2340A, constituted a “necessary and proper” implementation of the U.N. Convention Against Torture), *cert. denied*, 131 S. Ct. 1511 (2011); *Lue*, 134 F.3d at 82-84 (relying on *Holland* to sustain the Hostage Taking Act, 18 U.S.C. § 1203, as “necessary and proper” to implement the Hostage Taking Convention). *See also Neely v. Henkel*, 180 U.S. 109, 121 (1901) (the Necessary and Proper Clause “includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power”).

Moreover, as the court explained in *Belfast*, in determining whether the Necessary and Proper Clause grants Congress authority to enact legislation implementing a treaty, the word “necessary” does not mean “absolutely necessary.” 611 F.3d at 804, quoting *Comstock*, 130 S. Ct. at 1956. All that is required is that the implementing legislation bear a rational relationship to the treaty.¹³ *See also Lue*, 134 F.3d at 84 (“[T]he ‘plainly adapted’ standard requires that the effectuating legislation bear a rational relationship to a permissible constitutional end.”). No court has ever suggested otherwise.

The Chemical Weapons Statute clearly satisfies this standard. As the court observed in *Lue*, an act of Congress “plainly bears a rational relationship to [a] Convention[] [where] it tracks the language of the Convention in all material respects.” 134 F.3d at 84. As the district court noted in this case, *see App.* 168, the provisions of the Chemical Weapons Statute virtually mirror the provisions of the Chemical Weapons Convention that the statute implements. Thus, 18 U.S.C. § 229(a)(1), which makes it unlawful for any person “to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon,” adopts almost verbatim the prohibitions contained in Articles I and VII of the Convention. Likewise, the definitions of “chemical weapon” and “toxic chemical” contained in the Chemical Weapons Statute are virtually identical to the definitions of those terms in the Convention. *Compare* Chemical Weapons Convention, art. II, §§ 1, 2 *with* 18 U.S.C. § 229F. Accordingly, the Chemical Weapons Statute plainly bears a “rational relationship” to the Convention it was enacted to implement.

* * * *

Finally, to the extent Bond has raised more general federalism concerns with Section 229, they are not only without legal foundation but also fundamentally misplaced. In this case, neither the Convention nor its implementing legislation restrikes the balance between the federal government and the states. Section 229 neither preempts state law nor precludes state prosecution of the same activity. Rather, it establishes a parallel basis for federal prosecution. Section 229 also does not require or compel state officials to take any particular action to address the behavior at issue here. State officials remain just as free to act, or not to act, as they were prior to Section 229’s enactment. Accordingly, Section 229 advances compelling national and international interests, and does so in a manner that does not intrude on state prerogatives.

In short, the President’s decision, by and with the advice and consent of the Senate, to have the United States become a party to the Chemical Weapons Convention was an appropriate

¹³ At the same time, the *Belfast* Court correctly observed that “Congressional power to pass those laws that are necessary and proper to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations.” *Belfast*, 611 F.3d at 805.

exercise of the Treaty Power. The overall goal of that Convention—eliminating the production and use of chemical weapons by both states and non-state actors—is a national interest of the highest order. Congress fulfilled express obligations under the Convention by enacting implementing legislation, including 18 U.S.C. § 229(a)(1), that was both necessary and proper to implement the relevant provisions of the Convention. The district court correctly concluded that Congress acted within its constitutional authority.

* * * *

On October 14, 2011, the United States filed its supplemental reply brief in the *Bond* case, repeating its arguments that the Chemical Weapons Statute is a valid exercise of the Commerce Clause Power and the Treaty Power under the U.S. Constitution. The United States again explained that the Court need not address the Treaty Power basis for the statute because Congress’s Commerce Clause authority to enact the statute is clear. The section of the brief discussing the Treaty Power is excerpted below with most footnotes and citations to the record omitted. The full text of the reply brief is available at www.state.gov/s/l/c8183.htm.

* * * *

In the event this Court finds it appropriate to address Bond’s Treaty Power arguments, they also fail for the reasons set forth in the government’s earlier brief. Bond claims that Congress exceeded the permissible bounds of the Necessary and Proper Clause when it enacted Section 229, and she argues that this exercise of Congress’s Necessary and Proper authority offends the Tenth Amendment to the Constitution and any structural limits it embodies. The arguments that Bond raises have been rejected by the Supreme Court (as well as other courts of appeals), and this Court is therefore bound to reject her arguments as well.

As explained in the government’s earlier brief, when Congress enacts legislation pursuant to the Necessary and Proper Clause to implement a valid treaty, all that is required is that the implementing legislation bear a rational relationship to the treaty. *See United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (“[T]he ‘plainly adapted’ standard requires that the effectuating legislation bear a rational relationship to a permissible constitutional end.”). Indeed, “the relevant inquiry” in examining the validity of legislation under the Necessary and Proper Clause, as the Supreme Court recently reiterated in *United States v. Comstock*, “is simply whether the means chosen are reasonably adapted to the attainment of a legitimate end under the [subject] power.” 130 S. Ct. 1949, 1957 (2010) (internal quotation marks and citation omitted).

The word “necessary” of course does not mean “absolutely necessary.” *United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010), quoting *Comstock*, 130 S. Ct. at 1956; *see also Holland*, 252 U.S. at 432 (“If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government”). Thus, Bond’s claim that the statute is not necessary and proper because it “goes beyond what is necessary to implement the treaty,” is plainly inconsistent with the Supreme Court’s long-standing articulation of the appropriate test.

When Section 229 is evaluated against the necessary and proper standard that courts actually apply, Bond’s assertion that the Chemical Weapons Statute contains language different

in some minor respects from the corresponding language of the Convention becomes entirely irrelevant. The slight differences identified by Bond are overstated and, in any event, entirely academic in the context of this case. The offense of possession is plainly encompassed within the terms “acquire” and “retain,” both of which are expressly covered by the Convention. See Chemical Weapons Convention art. I, § 1(a); *see also* S. Exec. Rep. 104-33, at 2 (“[t]he goals of the [Convention] are to eliminate the possession of chemical weapons, to reverse chemical weapons proliferation, and to preclude any future use of these weapons”) (emphasis added). Further, Bond entered a plea of guilty to the full range of offenses punishable under the statute, including transferring and using a chemical weapon, terms that are found in both the Convention and the implementing statute. It is therefore inconsequential whether, as to Bond, the additional statutory offense of possession was also within the ambit of the Convention.

Bond’s assertion that the Chemical Weapons Statute exceeds what is necessary and proper to implement the Convention because Congress could have left implementation of Article VII of the Convention to the states is also without merit. There is no doubt that the Necessary and Proper Clause must afford Congress sufficient discretion to decide how best to execute the powers set forth in the Constitution. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (explaining that the “constitution must allow to the national legislature that discretion[] with respect to the means by which the powers it confers are to be carried into execution”); *Lue*, 134 F.3d at 84 (emphasizing “the need to preserve a realm of flexibility in which Congress can carry out its delegated responsibilities”). *See also Belfast*, 611 F.3d at 805 (finding that Congress’s power under the Necessary and Proper Clause “is nowhere broader and more important than in the realm of foreign relations”). It was well within Congress’s discretion under the Necessary and Proper Clause to conclude that a rational approach to ensuring the United States’s compliance with the Convention was to create a uniform federal criminal offense, rather than to do nothing and to hope that the states would enact 50 parallel implementing laws. Indeed, leaving implementation of treaty obligations to the states could easily have resulted in uneven efforts at compliance and further served to confuse our treaty partners as to whether the United States was in full compliance with its Convention obligations.

In addition, contrary to Bond’s assertions, the non-self-executing character of Article VII actually supports Congress’s decision to enact federal legislation. Because the relevant provisions of the Convention are not directly judicially enforceable, the absence of federal legislation to implement the Convention’s requirements could have left the federal government without adequate means to ensure U.S. compliance with the Convention, a validly enacted treaty that constitutes the supreme law of the land. Thus, implementing the Convention by federal legislation was well within Congress’s discretion.

* * * *

Since it is clear that this Court cannot overturn *Missouri v. Holland*, 252 U.S. 416 (1920), Bond advances a novel reading of that case that is not supported by either the opinion itself or by any subsequent cases addressing *Holland*. Bond argues that in determining whether a statute can be upheld as a valid implementation of the Treaty Power, the various federal and state interests must be balanced. The *Holland* decision does not support such a reading, and Bond does not cite a single case that either finds a balancing test hidden within *Holland* or applies a balancing test in resolving a Treaty Power issue.

Ultimately, it is *Holland* itself that disproves Bond's balancing theory. The *Holland* opinion does note that the migratory birds covered by the statute had only a temporary presence within a state such as Missouri, 252 U.S. at 434, but the decision does not rest on these facts. Indeed, the Court's opinion immediately thereafter discusses instances in which treaties trenching upon more established state interests (such as statutes of limitations, confiscation of debts, and escheat of land within a state) were upheld. *See id.* at 434-35. Summarizing this point, the Court concludes: "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power." *Id.* at 434. The *Holland* Court also notes that the "national interest [was] of very nearly the first magnitude" in that case and that reliance on the states was not sufficient to protect that interest. *Id.* at 435. But again the decision does not rest on this point, as the Court found that "were it otherwise, the question is whether the United States is forbidden to act." *Id.* The Court's opinion makes clear that it is not. *See id.* at 433 ("[I]t is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found.") (internal quotation marks and citation omitted).

With respect to the Tenth Amendment, *Holland* flatly contradicts Bond's assertion that the Court upheld the Migratory Bird Treaty Act on the basis of a purported balancing test. The Court made this point emphatically: "[I]t is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly" to the federal government. 252 U.S. at 432 (emphasis added).

Rather than adopting a balancing test to address *Holland*'s Tenth Amendment claim, the Court instead looked to whether the treaty "contravene[d] any prohibitory words [of] the Constitution." *Id.* at 433. Courts before and after *Holland* have followed the same approach, which is grounded in a precise reading of the Constitution's text and structure. *See Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (explaining that the Treaty Power "is in terms unlimited except by those restraints which are found in [the Constitution] against the action of the government or of its departments"); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (applying this approach to find that Congress could not give effect to the Status of Forces Agreement with Japan in a manner that deprived U.S. citizens of the right to an indictment and trial by jury).

Even if it were not inconsistent with *Holland*, Bond's balancing approach is fundamentally flawed on its own terms, because Bond improperly weighs the state's generalized sovereignty interests against what she characterizes as the limited federal interest in prosecuting one defendant in one case. As the government explained in detail in its earlier brief, however, the strong federal interest in prohibiting the use of chemical weapons by individuals is of the highest order and is closely tied not only to the United States's treaty commitments to eradicate the production and use of chemical weapons, but also to the promotion of foreign and interstate trade in chemicals used for peaceful purposes. The state's interest in deciding how to prosecute and punish local assaults is not directly implicated, as the state's prosecutorial discretion is protected by the principle of dual sovereignty.

In the end, Bond's Tenth Amendment arguments cannot be squared with *Holland* or with later cases interpreting and reaffirming *Holland*. Congress, in enacting the Chemical Weapons Statute, acted well within its power and discretion to craft legislation necessary and proper to implement a valid treaty eliminating the production and use of chemical weapons by both states

and individuals. Accordingly, 18 U.S.C. § 229 is a valid exercise of Congress's enumerated powers and does not violate the Tenth Amendment.

* * * *

2. Constitutionality of Statue Implementing Berne (Copyright) Convention: *Golan v. Holder*

On August 3, 2011, the United States filed its brief in the United States Supreme Court in *Golan v. Holder*, No. 10-545. Brief for the Respondents, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/08/Golan-response-for-the-US.pdf>. Excerpts below come from two different sections of the U.S. brief. The first is from the "Statement," and explains the background of the case, which involves challenges to the constitutionality of a statute enacted in the United States to ensure that other parties to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") perceived the United States to be complying with its obligations under the Berne Convention. The second excerpt is from the section of the Argument that explains how the statute was narrowly tailored to achieve that goal. The district court had initially rejected the challenges to the constitutionality of the statute on both Copyright Clause and First Amendment grounds. The U.S. Court of Appeals for the Tenth Circuit affirmed in part but reversed and remanded with respect to the district court's First Amendment ruling. On remand, the district court held that the statute violated the First Amendment. The Court of Appeals for the Tenth Circuit reversed and petitioners sought certiorari in the U.S. Supreme Court. ** Most footnotes and citations to the record have been omitted.

* * * *

... The Berne Convention generally requires each party to afford foreign copyright holders the same protections it affords its own nationals, and the Convention establishes a required minimum level of copyright protection in member countries. One such protection is set forth in Article 18, which requires parties to restore copyright protection to certain unprotected foreign works whose copyright terms have not yet expired in their country of origin.

The United States joined the Berne Convention in 1989....

To implement the treaty, Congress initially passed the Berne Convention Implementation Act of 1988 (BCIA), Pub. L. No. 100-568, 102 Stat. 2853. The BCIA adopted a "minimalist approach" to implementation and made "only those changes to American copyright law that [we]re clearly required under the treaty's provisions." H.R. Rep. No. 609, 100th Cong., 2d Sess. 7 (1988) (*Berne House Report*); accord *id.* at 20. Recognizing that Article 18 raised "difficult questions" that called for "legislative caution," Congress postponed full consideration of that provision until it could undertake "a more thorough examination." *Id.* at 51-52; see S. Rep. No. 412, 103d Cong., 2d Sess. 225 (1994) (*URAA Report*).

** Editor's note: The Supreme Court issued its opinion in *Golan v. Holder* on January 18, 2012. The Court upheld the statute under both the First Amendment and the Copyright Clause of the Constitution.

In the ensuing years, the United States and 123 other countries concluded the Uruguay Round of multilateral trade negotiations, which included the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement required parties to, *inter alia*, comply with Article 18 of the Berne Convention and therefore to restore copyrights in certain foreign works.... And TRIPS provided an effective means by which a WTO member could challenge any other WTO member's implementation of Berne, through the dispute settlement procedures of the then-newly established WTO. ...A finding of noncompliance through that process could lead to the imposition of trade sanctions.

In the context of considering implementation of TRIPS, Congress and the Executive Branch revisited implementation of Article 18. Congress learned that other countries believed the United States to be out of compliance with Article 18, and that the United States could face the prospect of a WTO dispute settlement proceeding. *E.g.*, *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before Subcomms. of the House & Senate Comms. on the Judiciary*, 103d Cong., 2d Sess. 131, 147, 241, 247-248 (1994) (*Joint Hearing*). Witnesses also testified that nonexistent or ineffective copyright protections for the works of American authors abroad had led to considerable losses in foreign trade, and that the United States' failure to restore copyright protection to certain foreign works was hindering diplomatic efforts to secure copyright protections for American authors abroad. *E.g.*, *id.* at 120, 131, 136-137, 189, 241, 247, 253, 256, 291.

On December 8, 1994, Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809. Section 514 of the URAA (17 U.S.C. 104A and 17 U.S.C. 109(a) (2006 & Supp. III 2009)) implements Article 18 of Berne by restoring the remainder of the copyright term that certain foreign works would have enjoyed but for (i) lack of national eligibility (*i.e.*, if the foreign work was first published in a country, and authored by a foreign national of a country, that did not previously have copyright relations with the United States), (ii) absence of subject-matter protection for sound recordings fixed before federal law afforded copyright protection to such recordings, or (iii) failure to comply with statutory formalities (*e.g.*, fixing a copyright notice or filing a timely renewal application). 17 U.S.C. 104A(a)(1)(B) and (h)(6)(C). The URAA did not afford copyright protection to foreign works that were in the public domain in the country of origin or the United States because the full copyright term had expired. 17 U.S.C. 104A(h)(6)(B) and (C). Under Section 514, restored copyrights "subsist for the remainder of the term of copyright that the work would have otherwise been granted *** if the work never entered the public domain." 17 U.S.C. 104A(a)(1)(B).

Section 514 is prospective only and has no effect on the legality of conduct that occurred before the URAA was enacted. Rather, the effect of restoring copyright to a particular foreign work is to make available various statutory remedies ... for acts of infringement that occur "on or after the date of restoration." 17 U.S.C. 104A(d)(1) and (2). Section 514 also permitted all persons to make additional copies of, and otherwise use, the affected works for an additional year after enactment of the URAA. ...

Section 514 also provides various accommodations for "reliance parties" (17 U.S.C. 104A(h)(4)) who had exploited the affected foreign works before the URAA was enacted. Such persons can continue to exploit the restored works unless and until the foreign copyright holder gives notice of an intent to enforce, either by filing a notice with the Copyright Office within two years of restoration, or by notifying the reliance party directly. 17 U.S.C. 104A(c), (d)(2)(A)(i) and (B)(i). Even after receiving notice, a reliance party may continue to exploit any existing copies of the restored work for another year. 17 U.S.C. 104A(d)(2)(A)(ii) and (B)(ii). A person

who has created a “derivative work,” based on a work subject to a restored copyright, can continue to exploit that work indefinitely if he pays reasonable compensation to the copyright owner. 17 U.S.C. 104A(d)(3). If the parties cannot agree on reasonable compensation, a district court may set a reasonable rate that takes into account any “contributions of expression of *** the reliance party to the derivative work.” 17 U.S.C. 104A(d)(3)(B).

2. Petitioners seek to use, copy, or sell, in ways that normally would constitute infringement, works whose copyrights were restored under Section 514. They brought this action alleging, *inter alia*, that the URAA exceeds Congress’s powers under the Copyright Clause and that it violates the First Amendment.

* * * *

a. Realization of the full benefits of membership in the Berne Convention depends not simply on our government’s own assessment of its treaty obligations, but also on how international partners are likely to perceive the United States’ actions. Section 514 minimizes the likelihood that other countries who are parties to TRIPS will bring actions under the WTO dispute settlement mechanism to challenge the United States’ implementation of Article 18 of Berne. It also protects the United States against trade sanctions, and it ensures that the United States will maintain its international credibility. Congress and the Executive Branch reasonably concluded that any “restoration” that allowed reliance parties to continue exploiting otherwise restored works unchecked, on a permanent basis, would not adequately achieve those objectives. ...

* * * *

c. Petitioners identify various means by which (in their view) Congress might have implemented the Berne Convention while burdening “substantially less speech.” Those arguments provide no sound basis for invalidating the considered balance that Congress actually struck.

Petitioners assert that under Article 18(3) of the Berne Convention, the United States could have entered into “special conventions” with Berne member nations to avoid restoration altogether. There is no reason to suppose, however, that each of the more than 160 Berne or WTO members would have entered into bilateral or multilateral agreements exempting the United States from the requirements of Article 18, and any effort to negotiate such agreements would have been an extremely arduous diplomatic undertaking. Moreover, agreements along those lines would have directly contravened the government’s other important interests: ensuring adequate protections for U.S. copyrighted works abroad and remedying historical inequalities in the copyright system.

Second, petitioners observe that Article 18(3) of the Berne Convention permits member nations to “determine, each in so far as it is concerned, the conditions of application of this [restoration] principle.” Petitioners argue that the United States could have invoked that provision as a ground for permitting all “reliance parties” to continue to exploit the restored works unchecked, on a permanent basis. Again, such an approach would have directly conflicted with the United States’ other important interests. More fundamentally, however, Congress reasonably concluded that granting full and permanent immunity to reliance parties would not ensure actual and perceived compliance with Berne. That determination is well supported and is squarely within the political Branches’ special expertise.

Whatever the precise scope of discretion afforded to Berne member nations by Article 18(3)'s "conditions of application" language, Congress had ample reason to conclude that other member nations would view the grant of a free and permanent license for all reliance parties as insufficient to implement Article 18's restoration principle. Whether or not a regime affording absolute and permanent protection to reliance parties could plausibly have been defended in a WTO proceeding, Congress and the Executive Branch understandably did not want the United States to be the defendant in a test case. See *Joint Hearing* 241 (statement of Eric Smith) (WTO proceeding would "be very damaging to the United States and to our reputation as a world leader in the copyright field"). More generally, the United States has a substantial interest in avoiding the appearance of an international-law violation, which would damage the Nation's credibility and undermine its status as a "trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

* * * *

Cross References

Consular Notification and Compliance Act, **Chapter 2.A.2.c.**

Bermuda Mutual Legal Assistance Treaty, **Chapter 3.A.1.**

Extradition of fugitive alleging Torture Convention claim (Trinidad y Garcia v. Benov), **Chapter 3.A.3**

International Law Commission work on reservations to treaties and effects of armed conflict on treaties, **Ch. 7.C.**

South Sudan succession, **Chapter 9.B.1**

Deference to Executive Branch interpretation of treaty, **Chapter 10.E.1.**

Rwanda Bilateral Investment Treaty, **Chapter 11.D.5.**

Thailand's declarations on ratification of UNCLOS, **Chapter 12.A.4.d.**

Treaty on Conventional Armed Forces in Europe, **Chapter 18.B.6.**

Chapter 5

Foreign Relations

A. CONSTITUTIONALITY OF STATE LAWS CONCERNING IMMIGRATION

1. Arizona

As discussed in *Digest 2010* at 163-68, the United States sought and obtained a preliminary injunction barring enforcement of certain provisions of an Arizona law, S.B. 1070, in the U.S. District Court for the District of Arizona in 2010. On April 11, 2011, the U.S. Court of Appeals for the Ninth Circuit agreed with the district court's holding that those provisions of S.B. 1070 are preempted by federal immigration law and upheld the preliminary injunction. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011). In the portion of the court's opinion excerpted below, the court considered foreign policy concerns about the Arizona law, with reference to the declaration by Deputy Secretary of State James B. Steinberg submitted by the United States in the district court. In December 2011, the United States Supreme Court granted certiorari in the case. *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (2011).

* * * *

...[T]he record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations, which weighs in favor of preemption. *See generally* [*Am. Ins. Ass'n v.*] *Garamendi*, 539 U.S. 396, 123 S.Ct. 274 [(2003)] (finding obstacle preemption where a State law impinged on the Executive's authority to singularly control foreign affairs); *Crosby* [*v. National Foreign Trade Council*], 530 U.S. 363, 120 S.Ct. 2288 [(2000)] (same). In *Garamendi*, the Court stated that "even ... the *likelihood* that state legislation will produce something more than *incidental* effect in conflict with express foreign policy of the National Government would require preemption of the state law." 539 U.S. at 420, 123 S.Ct. 2374 (emphasis added).

The record before this court demonstrates that S.B. 1070 does not threaten a "*likelihood* ... [of] produc[ing] something more than *incidental* effect;" rather, Arizona's law has created *actual* foreign policy problems of a magnitude far greater than incidental. *Garamendi*, 539 U.S. at 419, 123 S.Ct. 2374 (emphasis added). Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations.

In addition to criticizing S.B. 1070, Mexico has taken affirmative steps to protest it. As a direct result of the Arizona law, at least five of the six Mexican Governors invited to travel to

Phoenix to participate in the September 8–10, 2010 U.S.-Mexico Border Governors' Conference declined the invitation. The Mexican Senate has postponed review of a U.S.-Mexico agreement on emergency management cooperation to deal with natural disasters.

In *Crosby*, the Supreme Court gave weight to the fact that the Assistant Secretary of State said that the state law at issue “has complicated its dealings with foreign sovereigns.” 530 U.S. at 383–84, 120 S.Ct. 2288. Similarly, the current Deputy Secretary of State, James B. Steinberg, has attested that S.B. 1070 “threatens at least three different serious harms to U.S. foreign relations.” In addition, the Deputy Assistant Secretary for International Policy and Acting Assistant Secretary for International Affairs at DHS has attested that Arizona’s immigration law “is affecting DHS’s ongoing efforts to secure international cooperation in carrying out its mission to safeguard America’s people, borders, and infrastructure.” The Supreme Court’s direction about the proper use of such evidence is unambiguous: “statements of foreign powers necessarily involved [,] ... indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act.” *Crosby*, 530 U.S. at 385, 120 S.Ct. 2288. Here, we are presented with statements attributable to foreign governments necessarily involved and opinions of senior United States’ officials: together, these factors persuade us that Section 2(B) thwarts the Executive’s ability to singularly manage the spillover effects of the nation’s immigration laws on foreign affairs.

* * * *

2. Alabama

Subsequent to Arizona’s enactment of S.B. 1070, several other states enacted similar laws directed at immigrants who may be present in those states unlawfully. On August 1, 2011, the United States filed a complaint in the U.S. District Court for the Northern District of Alabama, seeking:

to declare invalid and preliminarily and permanently enjoin the enforcement of various provisions of House Bill 56, as amended and enacted by the State of Alabama, [(“H.B. 56”)] because those provisions are preempted by federal law and therefore violate the Supremacy Clause of the United States Constitution.

Complaint ¶ 1, *United States v. Alabama* (N.D. Ala. 2011), available at www.justice.gov/opa/documents/complaint-us-v-alabama.pdf.

As explained in the U.S. complaint, H.B. 56 is “sweeping” in its reach and seeks, among other things:

to punish unlawful entry and presence by requiring, whenever practicable, the determination of immigration status during any lawful stop by the police where there is ‘reasonable suspicion’ that an individual is unlawfully present, and by establishing new state punitive and criminal sanctions against unlawfully present aliens.

Complaint ¶ 3.

The United States argued that various provisions of the Alabama law, reflecting the law's "enforcement-at-all-costs approach," Complaint ¶5, impermissibly interfere with federal immigration authority in several interrelated respects:

H.B. 56 conflicts with and otherwise stands as an obstacle to Congress's demand for sufficient flexibility in the enforcement of federal immigration law to accommodate the competing interests of immigration control, national security and public safety, humanitarian concerns, and foreign relations—a balance implemented through the supervision and policies of the President and various executive officers with the discretion to enforce the federal immigration laws. *See* 8 U.S.C. § 1101 *et seq.* Enforcement of H.B. 56 would also effectively create state crimes and sanctions for unlawful presence despite the exclusive federal control over the consequences for unlawful presence and Congress's considered judgment to establish civil removal—and not criminalization or other punitive sanction—as the exclusive consequence of unlawful status. Alabama's punitive scheme would further undermine federal foreign policy, in that the federal government has—as a matter of mutual understandings—established that unlawfully present foreign nationals (who have not committed some other violation of law) should be removed without criminal sanction or other punitive measures and that the same treatment should be afforded to American nationals who are unlawfully present in other countries. H.B. 56 would thus interfere with federal policy and prerogatives in the enforcement of the immigration laws, and with the administration and enforcement of U.S. education laws.

Complaint ¶ 36.

Along with its motion for a preliminary injunction in this case, the United States submitted a declaration by Deputy Secretary of State William J. Burns, dated July 29, 2011, which discussed the United States' foreign policy concerns about H.B. 56 and comparable state laws. Deputy Secretary Burns' declaration is excerpted below and available in full at www.state.gov/s/l/c8183.htm. The district court granted the United States' motion for a preliminary injunction in part on October 13, 2011. *United States v. State of Alabama*, 2011 WL 4469941 (N.D. Ala.). The U.S. Court of Appeals for the Eleventh Circuit also granted in part the United States' motion for an injunction pending appeal. *United States v. State of Alabama*, 443 Fed. Appx. 411, 2011 WL 4863957 (11th Cir. 2011).

* * * *

5. ... U.S. federal immigration law incorporates foreign relations concerns by providing a comprehensive range of tools for regulating entry and enforcement. These may be employed with sensitivity to the spectrum of foreign relations interests and priorities of the national government. By contrast, Alabama law H.B. 56 establishes an inflexible, state-specific immigration enforcement policy based narrowly on criminal sanctions that is not responsive to

these concerns, and that unnecessarily antagonizes foreign governments. If allowed to enter into force, H.B. 56 would result in lasting harm to U.S. foreign relations and foreign policy interests.

6. Through the Immigration and Nationality Act (“INA”) and other federal laws, the national government has developed a comprehensive regime of immigration regulation, administration, and enforcement, in which the Department of State participates. This regime is designed to accommodate complex and important U.S. foreign affairs priorities—including economic competitiveness and trade, humanitarian and refugee protection, access for diplomats and official foreign visitors, national security and counterterrorism, criminal law enforcement, and the promotion of U.S. human rights policies abroad. To allow the national government flexibility in addressing these concerns, the INA provides the Executive Branch with a range of options governing the entry, treatment, and departure of aliens. Moreover, foreign governments’ reactions to immigration policies and the treatment of their nationals in the United States impacts not only immigration matters but also any other issue on which we seek cooperation with foreign states, ranging from investment protection to tourism to defense. These foreign relations priorities and policy impacts are ones to which the national government is sensitive in ways that individual states are not.

7. By rigidly imposing a singular form of immigration enforcement through mandatory verification of immigration status and criminal enforcement of alien registration, H.B. 56 interferes with the national government’s carefully calibrated policy of immigration regulation. The Alabama law also uniquely burdens foreign nationals by regulating, and in many cases criminalizing, work, travel, housing, contracting, and educational enrollment well beyond any restrictions imposed by U.S. law. These multiple, interlinking procedural and criminal provisions, adopted to supplant the federal regime and deter unlawfully present aliens from entering or residing in the State of Alabama, all manifest Alabama’s intention to regulate virtually every aspect of those aliens’ lives and to influence immigration enforcement nationwide. H.B. 56 thereby undermines the diverse immigration administration and enforcement tools made available to federal authorities, and establishes a distinct state-specific immigration policy, driven by an individual state’s own policy choices, which risks significant harassment of foreign nationals, is insensitive to U.S. foreign affairs priorities, and has the potential to harm a wide range of delicate U.S. foreign relations interests.

8. Alabama’s H.B. 56 also must be viewed in the context of the recent proliferation of stringent state laws addressed to the issue of immigration enforcement. Arizona enacted such a law, after which H.B. 56 was modeled in part, in April 2010; Utah enacted such a law in March 2011; Georgia and Indiana enacted such laws in May 2011; and South Carolina enacted such a law in June 2011. The first law in this series, Arizona’s S.B. 1070, created significant difficulties for U.S. bilateral relationships with many countries, particularly in the Western Hemisphere, and provoked vociferous and sustained criticism in a variety of regional and multilateral bodies. Foreign governments and international organizations expressed serious concerns regarding the potential for discriminatory treatment of foreign nationals posed by S.B. 1070, among other issues. These same criticisms and concerns have been reasserted—and expanded upon—in response to the recent wave of state laws, including H.B. 56.

9. By deviating from federal immigration enforcement policies as well as federal rules governing work, travel, housing, contracting, and educational enrollment by foreign nationals, and by seeking to regulate virtually every aspect of certain aliens’ lives, H.B. 56 threatens at least three different serious harms to U.S. foreign relations.

- *First*, H.B. 56 risks reciprocal and retaliatory treatment of U.S. citizens abroad, whom foreign governments may subject to equivalently rigid or otherwise hostile immigration regulations, with significant potential harm to the ability of U.S. citizens to travel, conduct business, and live abroad. Reciprocal treatment is an important concern in immigration policy, and U.S. immigration laws must always be adopted and administered with sensitivity to the potential for reciprocal or retaliatory treatment of U.S. nationals by foreign governments.
- *Second*, H.B. 56 antagonizes foreign governments and their populations, both at home and in the United States, likely making them less willing to negotiate, cooperate with, or support the United States across a broad range of foreign policy issues. U.S. immigration policy and treatment of foreign nationals can directly affect the United States' ability to negotiate and implement favorable trade and investment agreements, to secure cooperation on counterterrorism and counternarcotics trafficking operations, and to obtain desired outcomes in international bodies on priorities such as nuclear nonproliferation, among other important U.S. interests. Together with the other recently enacted state immigration laws, H.B. 56 is already complicating our efforts to pursue such interests. H.B. 56's impact is liable to be especially acute, moreover, not only among our critical partners in the region but also among our many important democratic allies worldwide, as those governments are the most likely to be responsive to the concerns of their constituents and the treatment of their own nationals abroad.
- *Third*, H.B. 56 threatens to undermine our standing in regional and multilateral bodies that address migration and human rights matters, and to hamper our ability to advocate effectively for the advancement of human rights and other U.S. values. Multilateral, regional, and bilateral engagement on human rights issues and international promotion of the rule of law are high priorities for the United States. Consistency in U.S. practices at home is critical for us to be able to argue for international law consistency abroad. By deviating from national policy in this area, H.B. 56 may place the United States in tension with our international obligations and commitments, and compromise our position in bilateral, regional, and multilateral conversations regarding human rights.

10. Furthermore, when H.B. 56 is considered in the context of the unprecedented surge in state legislative efforts to create state-specific immigration enforcement policies, each of these threats is significantly magnified, and several additional concerns arise.

- *First*, by creating a patchwork of immigration regimes, states such as Alabama make it substantially more difficult for foreign nationals to understand their rights and obligations, rendering them more vulnerable to discrimination and harassment.
- *Second*, this patchwork creates cacophony as well as confusion regarding U.S. immigration policy, and thereby undermines the United States' ability to speak with one voice in the immigration area, with all its sensitive foreign policy implications.
- *Third*, this patchwork fosters a perception abroad that the United States is becoming more hostile to foreign nationals, corroding a reputation for tolerance, openness, and fair treatment that is critical to our standing in international and multinational fora, our ability to attract visitors, students, and investment from overseas, our influence in a wide range of transnational contexts, and the advancement of our economic and other interests.

11. In light of these broad, overlapping, and potentially unintended ways in which immigration activities can adversely impact our foreign affairs, it is critically important that national immigration policy be governed by a uniform legal regime, and that decisions regarding

the development and enforcement of immigration policy be made by the national government. In all matters that are closely linked to U.S. foreign relations, including immigration, the United States is constantly engaged in weighing multiple competing considerations and choosing among priorities in order to develop an overall foreign policy strategy that will most effectively advance U.S. interests and values. The United States likewise is constantly seeking the support of foreign governments, through a delicately navigated process, across the entire range of U.S. policy goals. Only the federal government has the international relationships and information, and the national mandate and perspective, to be able to appropriately evaluate these choices on a continuing basis in response to fluctuating events on the world stage. The proliferation of state laws advancing state-specific approaches to immigration enforcement represents a serious threat to the national control over immigration policy that effective foreign policy demands.

12. While particular state enactments that incidentally touch on immigration may not implicate foreign affairs concerns or may implicate them only slightly, Alabama's law H.B. 56, even when considered in isolation, more directly and severely impacts U.S. foreign affairs interests by establishing an alternative immigration policy of multiple, interlinking procedural and criminal provisions, all of which manifest Alabama's intention to create a separate regulatory regime and to influence immigration enforcement nationwide. Alabama's effort to set its own immigration policy is markedly different from instances in which states and localities assist and cooperate with the federal government in the enforcement of federal immigration laws. Such a cooperative approach greatly diminishes the likelihood of conflicts with U.S. foreign policy interests. When states and localities work in concert with the federal government, and take measures that are coordinated with federal agencies and in line with federal priorities, the United States retains its ability to speak with one voice on matters of immigration policy, which in turn enables it to keep control of the message it sends to international audiences and to calibrate responses as it deems appropriate, in light of the ever-changing dynamics of foreign relations.

13. In contrast, H.B. 56 pursues a singular policy of criminal enforcement at all costs through, among other things, an extraordinary mandatory verification regime coupled with the effective state criminalization of unlawful presence and numerous other mutually reinforcing sanctions. By so doing, the law has the capacity to cause harassment of foreign nationals; to provoke retaliatory treatment of U.S. nationals overseas; to weaken public support among key constituencies abroad for cooperating with the United States; to endanger our ability to negotiate international arrangements and to seek bilateral, regional, or multilateral support across a range of economic, human rights, security, and other non-immigration concerns; and to be a source of ongoing criticism in international fora. Alabama's effort to set its own immigration policy conflicts with numerous U.S. foreign policy interests and with the United States' ability to speak with one voice in this sensitive area.

* * * *

34. H.B. 56 broadly threatens the national government's primacy in setting immigration policy and ensuring that, when the federal government has spoken, its word has weight and can be trusted by the international community. The Alabama law conflicts with or undermines a number of specific foreign policy positions of the United States, including: (1) that we do not ordinarily impose criminal sanctions or other punitive measures on foreign nationals solely for unlawful presence; (2) that we abide by norms of mutuality, hospitality, and respect, as well as the principle of uniformity, in crafting and enforcing our immigration rules; and (3) that we

honor our international legal, political, and moral commitments to protect the human rights of migrants. Foreign governments rely on these policies, and trust that we will treat their nationals accordingly; the United States, in turn, has the credibility and leverage to demand the same. It is because the international community perceives laws like H.B. 56 as reneging on these stated policy positions, which guarantee aliens are not, for example, subjected to legislated homelessness or put in prison solely for seeking work, that so many foreign governments have expressed their displeasure at such laws, and may retaliate in kind. This kind of grievance tarnishes the United States' image and reduces our ability to engage in foreign policy on numerous fronts.

* * * *

3. South Carolina

On October 31, 2011, the United States filed suit in the U.S. District Court for the District of South Carolina seeking to block enforcement of portions of an immigration law enacted in South Carolina, Act 69. Complaint, *United States v. South Carolina*, (D. S.C. 2011), available at www.justice.gov/opa/documents/us-v-sc-complaint.pdf. As in the cases brought against Arizona and Alabama, the United States again submitted a declaration by the deputy secretary describing the foreign policy concerns of the United States relating to state enforcement of immigration laws. Deputy Secretary Burns' declaration in the U.S. District Court for South Carolina, dated November 3, 2011, is broadly similar to his declaration in the case against Alabama, which is excerpted above. Deputy Secretary Burns' declaration regarding South Carolina's immigration law is available in full at www.state.gov/s/l/c8183.htm. On December 22, 2011, the district court granted, in part, the United States' motion for a preliminary injunction against enforcement of several key provisions in the South Carolina law. *United States v. South Carolina*, 2011 WL 6973241 (D. S.C. 2011).

4. Utah

On November 22, 2011, the United States brought another action seeking to enjoin enforcement of new state measures regarding immigration. The United States filed a complaint in the U.S. District Court for the District of Utah arguing that certain parts of a Utah law regulating immigration, H.B. 497, are preempted by federal law and therefore unconstitutional. Complaint, *United States v. Utah* (D. Utah), available at <http://extras.satrib.com/pdfs/DOJcomplaint.pdf>. As in Arizona, Alabama, and South Carolina, the U.S. State Department supported the Justice Department in its action against Utah. The declaration of Deputy Secretary Burns filed in the district court in Utah, dated December 7, 2011, is available at www.state.gov/s/l/c8183.htm. A Justice Department press statement, released on the day the Utah suit was filed, and available at www.justice.gov/opa/pr/2011/November/11-ag-1526.html, summarized the actions taken thus far to challenge state immigration laws:

The federal government has the ultimate authority to enforce federal immigration laws and the Constitution does not permit a patchwork of local immigration policies. A state setting its own immigration policy interferes with the federal government's enforcement efforts.

* * * *

The Justice Department previously challenged S.B. 1070, H.B. 56, and Act No. 69 on federal preemption grounds in Arizona, Alabama, and South Carolina, respectively. The department continues to review immigration-related laws that were passed in Indiana and Georgia. Courts have enjoined key parts of the Arizona, Alabama, Georgia, and Indiana state laws and temporarily restrained enforcement of Utah's law.

* * * *

B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Claims Act ("ATCA"), also referred to as the Alien Tort Statute ("ATS"), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been interpreted by the federal courts in cases raising human rights claims under international law. In 2004 the Supreme Court held that the ATCA is "in terms only jurisdictional" but that, in enacting the ATCA in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens. In an *amicus curiae* memorandum filed in the Second Circuit in *Filartiga v. Pena-Irala*, the United States described the ATCA as one avenue through which "an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts." Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980) (No. 79-6090).

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2011 developments in a selection of cases brought under the ATCA and the TVPA. The first entry (*Kiobel*) covers developments in a case in

which the United States participated in 2011. The second two entries cover developments in cases in which the United States participated previously but did not take part in proceedings in 2011.

2. *Kiobel v. Royal Dutch Petroleum*

In December 2011, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States in the case *Esther Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491. The U.S. brief argued that a corporation can be held liable in a federal common law action brought under the ATS. The case was brought by former residents of a region in Nigeria where defendant corporations, through a Nigerian subsidiary, were engaged in oil exploration and production. Plaintiffs alleged that defendants aided and abetted, or were otherwise complicit in, human rights abuses by Nigerian military and police forces that violated international human rights law. The district court had dismissed the case, in part. On interlocutory appeal, the court of appeals dismissed the complaint in its entirety for lack of subject matter jurisdiction, reasoning that corporate liability had not attained universal acceptance among nations so as to represent customary international law. The U.S. brief first argued that the issue of corporate liability was a question of the merits rather than subject matter jurisdiction and, second, urged the Supreme Court to determine that a corporation can be held liable in a federal common law action under the ATS for violating the law of nations. Excerpts from the United States brief appear below (with most footnotes and citations to the record omitted).^{*}

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II. A CORPORATION CAN BE HELD LIABLE IN A FEDERAL COMMON LAW SUIT BASED ON THE ALIEN TORT STATUTE FOR VIOLATING THE LAW OF NATIONS

The second question presented is whether a corporation can be held liable in a suit under the ATS for violating the law of nations. As the court of appeals recognized, a number of other questions, unanswered by this Court, are implicated by this case and other ATS cases. These include: whether or when a cause of action should be recognized for theories of secondary liability such as aiding and abetting, see *Aziz*, 658 F.3d at 395-401 (citing cases); whether or when a cause of action should be recognized under U.S. common law based on acts occurring in a foreign country, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-728 (2004); and whether or when congressional legislation such as the Torture Victim Protection Act of 1991 (TVPA),

^{*} Editor's note: On March 5, 2012, the United States Supreme Court issued an order in the *Kiobel* case directing the parties to file supplemental briefs addressing the issue of "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Digest 2012* will discuss the United States supplemental brief addressing this issue.

Pub. L. No. 102-256, 106 Stat. 73, should be taken into account in determining the scope and content of common law claims to be recognized under the ATS, cf. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-37 (1990). Those questions are important, but they were not decided by the court of appeals in this case and should not be answered by this Court here. And the holding on the issue the court of appeals did decide—that a corporation may not be held liable—is categorical and applies to all suits under the ATS, regardless of the theory of liability, the locus of the acts, the involvement of a foreign sovereign, or the character of the international-law norm at issue.

To isolate the consideration of the court of appeals' holding from those other issues, and to tie the corporate liability issue to the origins of the ATS, consider (for example) a civil suit brought by a foreign ambassador against a U.S. corporation for wrongs committed against the ambassador by the corporation's employees in the United States. Cf. *Sosa*, 542 U.S. at 716-717 (discussing assault on foreign ambassador to the United States in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784)). Or consider a suit against a corporation based on piracy committed by the corporation's employees. Cf. *id.* at 720, 724. Whether a federal court should recognize a cause of action in such circumstances is a question of federal common law that, while informed by international law, is not controlled by it.

A. Whether A Corporation May Be Held Liable In A Suit Based On The ATS Should Be Determined As A Matter Of Federal Common Law

1. This Court explained in *Sosa* that, although the ATS “is in terms only jurisdictional,” and does not create a statutory cause of action, “at the time of enactment” it “enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.” 542 U.S. at 712. At that time, the category encompassed “three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 724; see *id.* at 715, 720. Although the Court concluded that the door had not been closed “to further independent judicial recognition of actionable international norms” dictated by “the present-day law of nations,” *id.* at 725, 729, it identified certain cautionary factors to be considered in deciding whether to recognize such a claim under federal common law, *id.* at 725-728. The Court made clear, however, that “[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [Section] 1350,” one essential criterion is that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [those] historical paradigms.” *Id.* at 732. Accordingly, “any claim based on the present-day law of nations” must at least “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of th[ose] 18th-century paradigms.” *Id.* at 725.

2. Contrary to the court of appeals' conclusion, in determining whether a federal common law cause of action should be fashioned, courts are not required to determine whether “corporate liability for a ‘violation of the law of nations’ is a norm ‘accepted by the civilized world and defined with a specificity’ sufficient to provide a basis for jurisdiction under the ATS.” In so holding, the court of appeals confused the threshold limitation identified in *Sosa* (which does require violation of an accepted and sufficiently defined substantive international-law norm) with the question of how to enforce that norm in domestic law (which does not require an accepted and sufficiently defined practice of international law). That confusion stems in large part from the court's misreading of footnote 20 in the *Sosa* opinion.

In footnote 20, the Court explained that “[a] related consideration”—*i.e.*, a consideration related to “the determination whether a norm is sufficiently definite to support a cause of action”—“is whether international law extends the scope of liability for a violation of a given

norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Sosa*, 542 U.S. at 732 & n.20. The Court then proceeded to compare two cases exemplifying that “consideration.” The first was Judge Edwards’ concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), in which he found (in this Court’s words) an “insufficient consensus in 1984 that torture by private actors violates international law.” *Sosa*, 542 U.S. at 732 n.20. The second was *Kadic v. Karadžić*, 70 F.3d 232, 239-241 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), in which the court found (again, in this Court’s words) a “sufficient consensus in 1995 that genocide by private actors violates international law.” *Sosa*, 542 U.S. at 732 n.20. In a concurring opinion, Justice Breyer summarized footnote 20 as requiring that “[t]he norm * * * extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.” *Id.* at 760.

From *Sosa*’s footnote 20, it is clear that “if the defendant is a private actor,” *Sosa*, 542 U.S. at 732 n.20 (emphasis added), a court must consider whether private actors are capable of violating the international-law norm at issue. The distinction between norms that apply only to state actors and norms that also apply to nonstate actors is well established in customary international law. For example, the Torture Convention defines “torture” as certain conduct done “by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 4 (1988), 1465 U.N.T.S. 85, 113-114 (Torture Convention). In contrast, genocide and war crimes do not require state involvement. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (Genocide Convention); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (Common Article 3). Because certain international-law obligations *do* distinguish between state actors and non-state actors, to identify an accepted international-law norm with definite content for *Sosa* purposes, a court must conduct a norm-by-norm assessment to determine whether the actor being sued is within the scope of the identified norm.

The court of appeals, however, read *Sosa*’s footnote 20 more broadly in two respects. First, it misread the distinction between state actors and non-state actors—a distinction well recognized in international law—as a basis for drawing a distinction between natural and juridical persons—one that finds no basis in the relevant norms of international law. In fact, the footnote groups all private actors together, referring to “a private actor such as a corporation *or* individual.” *Sosa*, 542 U.S. at 732 n.20 (emphasis added). And, notably, the defendant in *Kadic* was a natural person, 70 F.3d at 236, whereas the defendants in *Tel-Oren* were not, 726 F.2d at 775.

Second, the court of appeals misread footnote 20 to require not just an international consensus regarding the content of an international-law norm, but also an international consensus on how to enforce a violation of that norm. That reading reflects a misunderstanding of international law which establishes the substantive standards of conduct and generally leaves the means of enforcing those substantive standards to each state. See Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) (“International law itself * * * does not require any particular reaction to violations of law.”); *Flomo v. Firestone Natural Rubber Co.*,

643 F.3d 1013, 1020 (7th Cir. 2011) (same)**; *Doe* [v. *Exxon Mobil Corp.*], 654 F.3d at 41-42 (same). Once it is established that the international norm applies to conduct by an actor, it is largely up to each state to determine for itself whether and how that norm should be enforced in its domestic law.

That is not to say that international law is irrelevant to all questions of enforcement. And, as discussed in Part II.B.3, *infra*, international law informs the court's exercise of its federal common law authority in determining whether to recognize a cause of action to remedy a violation of an international-law norm that otherwise meets the *Sosa* threshold—and in deciding what the contours of that cause of action should be. But that is a different task from satisfying *Sosa*'s threshold requirement of demonstrating the existence of an accepted and well-defined *substantive* international law norm. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“Although it is, of course, true that United States courts apply international law as part of our own in appropriate circumstances, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.”).

To satisfy *Sosa*, a plaintiff in an ATS suit must allege conduct that violates a substantive norm of international law accepted by civilized nations and defined with the requisite degree of specificity. To the extent that substantive norm is defined in part by the identity of the perpetrator, then the defendant must fall within that definition. Similarly, if the substantive norm is defined in part by the identity of the victim or the locus of events, then conduct committed against a different victim or in a different locale could not violate that norm and a suit under the ATS could not stand. See *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at *43 (9th Cir. Oct. 25, 2011) (McKeown, J., concurring in part and dissenting in part) (“[T]he handful of international law violations that may give rise to an ATS claim are often restricted by the identity of the perpetrator, the identity of the victim, or the locus of events.”), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011).

3. At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors. See, e.g., Torture Convention art. 1 (defining “torture” to include “*any act* by which severe pain or suffering * * * is intentionally inflicted on a person” for certain reasons, “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”) (emphasis added); Genocide Convention art. 2 (defining genocide to include “any of the following acts” committed with intent to destroy a group, without regard to the identity of the perpetrator); Common Article 3 (prohibiting “the following acts,” without regard to the identity of the perpetrator).

Both natural persons and corporations can violate international-law norms that require state action. And both natural persons and corporations can violate international-law norms that

** Editor's note: In 2011, the U.S. Court of Appeals for the Seventh Circuit also concluded that corporations can be liable under the ATS. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011). The plaintiffs in the case were Liberian children who alleged that Firestone used hazardous child labor at its rubber plant in Liberia in violation of customary international law. After deciding that corporate liability exists under the ATS, the *Flomo* court proceeded to determine that the allegations of the plaintiffs did not present an adequate basis for finding a violation of customary international law, leading the court to affirm the district court's dismissal of the case.

do not require state action. The court of appeals examined the question of corporate liability in the abstract, and therefore did not address whether any of the particular international-law norms identified by petitioners (or recognized by the district court as satisfying *Sosa*'s "demanding" standard, 542 U.S. at 738 n.30) exclude corporations from their scope. Because corporations (or agents acting on their behalf) can violate the types of international-law norms identified in *Sosa* to the same extent as natural persons, the question becomes whether or how corporations should be held accountable as a matter of federal common law for violations that are otherwise actionable in private tort suits for damages under the ATS.

B. Courts May Recognize Corporate Liability As A Matter Of Federal Common Law In Actions Under The ATS

This Court has instructed courts to act as "vigilant doorkeep[ers]," *Sosa*, 542 U.S. at 729, and to exercise "great caution" before "adapting the law of nations to private rights," *id.* at 728. Such restraint, however, does not justify a categorical exclusion of corporations from civil liability under the ATS.

1. The text of the ATS does not support the court of appeals' categorical bar. To the contrary, whereas the ATS clearly limits the class of plaintiffs to aliens, 28 U.S.C. 1350, it "does not distinguish among classes of defendants," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). The historical context supports the different textual treatment of ATS plaintiffs and defendants. As explained in *Sosa*, the ATS was passed by the First Congress in 1789, after the well-documented inability of the Continental Congress to provide redress for violations of treaties and the laws of nations for which the United States might be held accountable. See 542 U.S. at 715-717. The Continental Congress had "implored the States to vindicate rights under the law of nations," but only one State acted on that recommendation. *Id.* at 716. Notably, although that resolution "dealt primarily with criminal sanctions," William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed In Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491 (1986) (Casto), the Continental Congress took the further step of recommending that the States also make available suits for damages, 21 *Journals of the Continental Congress 1774-1789*, at 1136-1137 (Gillard Hunt ed. 1912) (Continental Congress). And, indeed, the resolution provided that while it might at times be necessary "to repair out of the public treasury" to compensate for injuries caused by individuals, "the author of those injuries" should ultimately "compensate the damage out of his private fortune." Continental Congress 1136.

Events like the "so-called Marbois incident of May 1784"—"in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French [Legation] in Philadelphia"—exposed the inability of the national government to redress law-of-nations violations. *Sosa*, 542 U.S. at 716-717; Casto 491-492 & n.138. A "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred in 1787, during the Constitutional Convention, when a New York City constable entered the residence of a Dutch diplomat with a warrant for the arrest of one of his domestic servants. Casto 494. And, again, the "national government was powerless to act." *Ibid.*

From this history, the *Sosa* Court concluded that the First Congress intended the ATS to afford aliens a *federal* forum in which to obtain redress for the "relatively modest set of actions alleging violations of the law of nations" at the time. 542 U.S. at 720; see *id.* at 724 (noting importance of "private remedy"); see *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring) (detailing evidence that the intent of the ATS "was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international

crisis”). Consistent with the recommendations of the Continental Congress, the First Congress both criminalized certain law-of-nations violations (piracy, violation of safe conducts, and infringements on the rights of ambassadors), see Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113-114 (1790 Act); *id.* § 28, 1 Stat. 118, and in the ATS provided jurisdiction over actions by aliens seeking civil remedies.

As the D.C. Circuit recently explained, there is no good “reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so.” *Doe*, 654 F.3d at 47. Given the apparent intent to provide compensation to the injured party through a civil damages remedy in a federal forum (rather than simply address the international affront through criminal prosecution or diplomatic channels), there is also no good reason to conclude that the First Congress would have wanted to allow the suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting. Take, for example, the 1787 incident involving the Dutch diplomat. If entry were made into his residence by the agent of a private process service company for the purpose of serving a summons on the diplomat, the international affront might equally call for vindication (and compensation) through a private suit against that company. Cf. 1790 Act, §§ 25-26, 1 Stat. 117-118 (providing that “any writ or process” that is “sued forth or prosecuted by any person” against an ambassador or “domestic servant” of an ambassador shall be punished criminally and would constitute a violation of “the laws of nations”). And later, in opining on a boundary dispute over the diversion of waters from the Rio Grande, Attorney General Bonaparte stated that citizens of Mexico would have a right of action under the ATS against the “Irrigation Company.” 26 Op. Att’y Gen. 250, 251 (1907).

2. More generally, the proposition that corporations are “deemed persons” for “civil purposes,” and can be held civilly liable, has long been recognized as “unquestionable.” *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Beaston v. Farmers’ Bank of Del.*, 37 U.S. (12 Pet.) 102, 134 (1838). Corporations are capable of “suing and being sued.” 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (1793); see 1 William Blackstone, *Commentaries on the Laws of England* 463 (1765) (corporations may “sue or be sued * * * and do all other acts as natural persons may”); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (detailing “common understanding” that corporations have long had the “capacity to sue and be sued”).

As particularly relevant here, corporations were capable of being sued in tort. This Court has explained that, “[a]t a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety.” *Philadelphia, Wilmington, & Balt. R.R. v. Quigley*, 62 U.S. (21 How.) 202, 210-211 (1859); see *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) (“[F]rom the earliest times to the present, corporations have been held liable for torts.”). In 1774, for example, Lord Mansfield’s opinion for the Court of King’s Bench held that a corporation could be held liable in damages for failing to repair a creek that its actions had rendered unnavigable. See *Mayor v. Turner*, (1774) 98 Eng. Rep. 980. Early American courts followed suit. See, e.g., *Chestnut Hill*, 4 Serg. & Rawle at 17; *Gray v. Portland Bank*, 3 Mass. (2 Tyng) 363 (1807); *Riddle v. Proprietors of the Locks*, 7 Mass. (6 Tyng) 168 (1810); *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90 (N.Y. Sup. Ct. 1809).

Holding corporations liable in tort for violations of the law of nations of the sort otherwise actionable in a federal common law action based on the ATS is thus consistent with the common law backdrop against which the ATS was enacted and subsequently amended. As even the Second Circuit recognized, this Nation's "legal culture" has "long" grown "accustomed" to imposing tort liability on corporations. Pet. App. A8-A9; see *Doe*, 654 F.3d at 48 ("The general rule of substantive law is that corporations, like individuals, are liable for their torts.") (citation omitted); 9A William M. Fletcher, *Cyclopedia of the Law of Corporations* § 4521 (2008 rev. ed.) (discussing tort suits against corporations). And the *Sosa* Court's cautionary admonitions provide no reason to depart from the common law on this issue.

3. International law does not counsel otherwise. As discussed (see Part II.A, *supra*), international law does not dictate a court's decision whether to recognize, and how to define, a federal common law cause of action to enforce a law-of-nations violation of the sort deemed potentially actionable under *Sosa*. But to the extent international law does speak to an issue, it should inform the court's exercise of its residual common law discretion. Here, nothing in international law counsels in favor of the Second Circuit's categorical bar to corporate liability.

The court of appeals relied heavily on its understanding that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights." But, even if correct, the court of appeals drew the wrong conclusion from that observation.

First, each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to the reach of substantive international law. See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 10 (Rome Statute) ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). Thus, the fact that no international tribunal has been created for the purpose of holding corporations *civilly* liable for violations of international law does not contribute to the analysis, because the same is true for natural persons. Cf. *Flomo*, 643 F.3d at 1019 ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals.").

Second, the reason why the jurisdiction of international *criminal* tribunals has thus far been limited to natural persons appears to be because of certain features unique to *criminal* punishment. That limitation is not indicative of a general prohibition against holding corporations (as compared to natural persons) accountable for violations of international law. For example, the Rome Statute, which established the International Criminal Court (ICC), was based on the principle of complementarity. Rome Statute preamble ¶ 10. The ICC was to assume criminal jurisdiction only when national courts were unable (or unwilling) to genuinely investigate or prosecute certain international crimes. See Rome Statute art. 17. Because many foreign states do not criminally prosecute corporations under their domestic law for any offense, extending the ICC's criminal jurisdiction to include corporations would have rendered complementarity unworkable. Notably, however, several countries (including the United Kingdom and the Netherlands) that have incorporated the Rome Statute's three crimes (genocide, crimes against humanity, and war crimes) into their domestic jurisprudence themselves impose criminal liability on corporations and other legal persons for such offenses. See Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—A Survey of Sixteen Countries—Executive Summary* 13-16, 30 (2006), <http://www.fafo.no/pub/rapp/536/536.pdf>.

With respect to Nuremberg in particular, while it is true that no private organization or corporation was criminally charged or convicted, it is equally true that nothing in the history of the Nuremberg proceedings suggests that juridical persons could never be held accountable (through criminal prosecution or otherwise) for violating international law. See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009) (noting that corporate liability was “explored, and was never rejected as legally unsound,” and that corporations were not prosecuted at Nuremberg “not because of any legal determination that it was impermissible under international law”); cf. Diarmuid Jeffreys, *Hell’s Cartel* 405-406 (2008) (noting that German court in subsequent suit, apparently brought under German law, held that “[t]he fundamental principles of equality, justice, and humanity must have been known to all civilized persons, and the [I.G. Farben chemical company in its current liquidated form] cannot evade its responsibility any more than can an individual”).

Third, international tribunals are not the sole (or even the primary) means of enforcing international-law norms. Until the twentieth century, domestic law and domestic courts were the primary means of implementing customary international law. And holding corporations accountable if they violate the law of nations is consistent with international law. Today, a number of international agreements (including some that the United States has ratified) require states parties to impose liability on corporations for certain actions. See, e.g., Convention Against Transnational Organized Crime, art. 10(1), Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. (2004), 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 43, 105th Cong., 2d Sess. (1998), 37 I.L.M. 1 (1998); see also, e.g., *Doe*, 654 F.3d at 48-49 & n.35. As the Chairman of the Rome Statute’s Drafting Committee explained, “all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages * * * and other remedies such as seizure and forfeiture of assets.” M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 379 (2d rev. ed. 1999).

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3. Doe v. Exxon Mobil

In 2011, the U.S. Court of Appeals for the District of Columbia Circuit also decided a case involving the question of corporate liability under the ATS. *Doe v. Exxon Mobil Corporation*, 654 F.3d 11 (D.C. Cir. 2011). For additional background on the case, see *Digest 2002* at 357-63 (discussing the U.S. statement of interest filed at the district court level); *Digest 2005* at 411-15 (excerpting the district court’s decision dismissing the ATS claims in the case); *Digest 2008* at 222-27 (discussing the U.S. *amicus* brief submitted to the U.S. Supreme Court when it considered a petition for certiorari in the case). The United States did not participate in the case at the appeals court level.

4. Sarei v. Rio Tinto

On October 25, 2011, the U.S. Court of Appeals for the Ninth Circuit issued its second en banc decision in *Sarei v. Rio Tinto*, 2011 WL 5041927 (9th Cir. 2011). Plaintiffs, current and former residents of Papua New Guinea, brought the action under the ATS against international mining group Rio Tinto, alleging that Rio Tinto was liable for international law violations by government forces in connection with maintaining the operation of its copper mine in Papua New Guinea during a civil uprising. The case had been dismissed once by the district court and remanded by the Ninth Circuit sitting en banc for a determination on the issue of prudential exhaustion. The appeal decided in 2011 was from the district court's holding that plaintiffs' claims for genocide, crimes against humanity, war crimes, and racial discrimination could proceed without requiring plaintiffs to exhaust local remedies. For additional background on the case, see *Digest 2001* at 337-39 (reprinting the letter from the Department of State in response to the request from the district court for views on the impact of the litigation on U.S. foreign policy); *Digest 2002* at 333-43, 357, 574-75 (discussing and excerpting the original decision by the district court dismissing based on the political question doctrine); *Digest 2006* at 431-50 (discussing and excerpting the Ninth Circuit's decision on appeal and the U.S. brief as *amicus* in support of rehearing); *Digest 2007* at 227-31 (discussing the Ninth Circuit's revision of its 2006 opinion and the U.S. *amicus* brief supporting a second petition for rehearing); *Digest 2008* at 238-44 (discussing and excerpting the Ninth Circuit's en banc decision). The United States did not participate in the appeal decided in 2011. Rio Tinto filed a petition for certiorari in the United States Supreme Court in November 2011 appealing the Ninth Circuit's 2011 en banc decision.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES

1. In re Refined Petroleum Products Antitrust Litigation**

On February 8, 2011, the Fifth Circuit affirmed the district court's judgment in an opinion that accepted arguments made by the United States in an August 16, 2010 brief as *amicus curiae*. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011). The United States argued that the district court properly dismissed class-action lawsuits that alleged antitrust violations in the oil and refined petroleum product industry based on the act of state and political question doctrines. For background on the case and excerpts from the *amicus* brief, see *Digest 2010* at 183-87. Excerpts of the Fifth Circuit's opinion, including

** Editor's note: *In re Refined Petroleum Products Antitrust Litigation* refers to the consolidation of the following separately-filed cases: *Countywide Petroleum Co. v. Petroleos de Venezuela, S.A.* (N.D. Ohio), *Fast Break Foods, LLC v. Saudi Aramco Corp.* (N.D. Ill.), *Green Oil Co. v. Saudi Arabian Oil Co.* (N.D. Ill.), *S-Mart Petroleum Inc. v. Petroleos de Venezuela, S.A.* (D.D.C.), *Spectrum Stores, Inc. v. CITGO Petroleum Corp.* (S.D. Tex.), *Central Ohio Energy, Inc. v. Saudi Arabian Oil Co.* (N.D. Ill.), and *Gokey v. CITGO Petroleum Corp.* (N.D. Tex.).

discussion of the U.S. Government's *amicus* brief, appear below with footnotes omitted.

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. . . The Appellants in this case allege that the national oil companies, as well as their subsidiaries, have conspired with OPEC member nations to fix prices of crude oil and refined petroleum products ("RPPs") in the United States, primarily by limiting crude-oil production—that is, by controlling the spigot.

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The Appellees moved to dismiss both complaints on several grounds. Primarily, they argued that dismissal was proper under Federal Rule of Civil Procedure 12(b)(1), because the claims pose nonjusticiable political questions, and under Rule 12(b)(6), because Appellants failed to state a claim for relief under the act of state doctrine.

* * * *

II.

. . . For reasons similar to those on which we have relied above, we hold alternatively that, under the act of state doctrine, Appellants have failed to state a claim on which relief can be granted.

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As we have already discussed, Appellees have met their burden of demonstrating that adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources. The Supreme Court has held, albeit in a different factual context, that exploitation of natural resources is an inherently sovereign function. *See United States v. California*, 332 U.S. 19, 38–39 (1947) (allocating the power to drill for oil in the three miles of water off the California coast to the United States instead of California). Indeed, our precedents indicate as much. *See United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977) (noting generally "the control that a sovereign such as the United States has over the resources within its territory. It can exploit them or preserve them or establish a balance between exploitation and preservation.").

In considering whether a merits review would require us to sit in judgment of the acts of foreign sovereigns in their own territories, we find instructive the reasoning of the Ninth Circuit in a similar case. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC* ("IAM"), 649 F.2d 1354 (9th Cir. 1981). In *IAM*, a labor union brought Sherman Act claims against OPEC and its member nations. *Id.* at 1355. The Ninth Circuit relied on the act of state doctrine in declining to address the merits, explaining that "the availability of oil has become a significant factor in international relations," and illustrating other courts' recognition of the "growing world energy crisis." 649 F.2d at 1360 (citing *Occidental of Umm*, 577 F.2d 1196; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977)). The court noted that "the United States has a grave interest in the petro-politics of the Middle East[and] that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area." *Id.* at 1361. "While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order

from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources.” *Id.*

The claims before us present a similar scenario. The granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories. Recognizing that the judiciary is neither competent nor authorized to frustrate the longstanding foreign policy of the political branches by wading so brazenly into the sphere of foreign relations, we decline to sit in judgment of the acts of the foreign states that comprise OPEC.

* * * *

2. McKesson v. Iran

On July 27, 2011, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the District of Columbia Circuit in the case *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174. The United States brief presented three arguments relating to U.S. interests implicated in the case. The section of the brief relating to the act of state doctrine is excerpted below (with most footnotes and citations to the record omitted). The section of the brief discussing the commercial activity exception to the Foreign Sovereign Immunity Act (“FSIA”) is discussed in Chapter 10. A final section of the brief, not excerpted, presented the United States’ view that the Treaty of Amity between the U.S. and Iran did not preclude the litigation. The U.S. *amicus* brief is available at www.state.gov/s/l/c8183.htm.***

* * * *

II. THE ACT OF STATE DOCTRINE DOES NOT APPLY TO THE CORPORATE CONDUCT AT ISSUE HERE.

A. Iran argues that the act of state doctrine prohibits United States courts from adjudicating this dispute. But the Supreme Court has explained that the act of state doctrine applies only “when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.” *Kirkpatrick*, 493 U.S. at 406; see also, *e.g.*, *Sabbatino*, 376 U.S. at 401 (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”).

The district court determined that this litigation does not turn on the validity of Iran’s currency control restrictions, but turns instead on the acts of Pak Dairy’s board of directors. Given that determination, there is no occasion to apply the act of state doctrine in this case because the conduct of Iran’s representatives on Pak Dairy’s board of directors cannot fairly be characterized as the sort of “official action by a foreign sovereign,” *Kirkpatrick*, 493 U.S. at 406,

*** Editor’s note: On February 28, 2012, the Court of Appeals issued its decision in the case, agreeing with the United States that the act of state doctrine does not preclude adjudication.

or the “public acts [of] a recognized foreign sovereign power,” *Sabbatino*, 376 U.S. at 401, to which the act of state doctrine applies.

McKesson has characterized its claim as one for expropriation, but this is not a typical case of a foreign government acting in its sovereign capacity to take private property for a public purpose. As this Court explained, this case instead concerns claims that Iran’s representatives on the Pak Dairy board of directors “cut off the flow of capital and other material to McKesson, froze out McKesson’s board members, and stopped paying McKesson’s dividends.” *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1103 (D.C. Cir. 2001) (*McKesson III*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003). Those facts identify a pattern of conduct by representatives of the government of Iran that cannot properly be deemed the public or official acts of the sovereign government itself.

Iran’s conduct had none of the hallmarks of official government action in the sovereign realm. Iran did not pass a law, issue an edict or decree, or engage in other formal governmental action explicitly taking McKesson’s property for the benefit of the Iranian public. Instead, Iran’s representatives on the board of directors exercised their corporate authority to deny McKesson its rights and dividends. The conduct of a majority shareholder exercising its power through the board of directors of a corporation to deny a minority shareholder the right to participate in and profit from its investment is not an official sovereign act. There is no indication—in light of the district court’s rejection of Iran’s currency controls defense—that the actions of Iran’s representatives on Pak Dairy’s board of directors were inextricably intertwined with the implementation of Iranian sovereign policy.

B. The Supreme Court has not defined the specific contours of the “official action” requirement of the act of state doctrine. But the concept is best understood to refer to conduct that is by its nature distinctly sovereign. The courts of appeals have held that genuinely and distinctly sovereign conduct should not be questioned by United States courts. Thus, this Court had “no doubt that issuance of a license permitting the removal of uranium from Kazakhstan is a sovereign act,” and therefore held that the act of state doctrine barred litigation challenging the denial of such a license. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (the “right to regulate imports and exports is a sovereign prerogative”). That case also held that a transfer of corporate shares to a state entity was likewise an act of state. *Id.* at 1166. Notably, and in direct contrast to the facts in this case, the Court emphasized that “this transfer and alleged conversion were accomplished pursuant to an official decree of the Republic of Kazakhstan.” *Ibid.* (“That kind of expropriation of property is the classic act of state addressed in the case law.”).

Similarly, this Court has applied the act of state doctrine where a foreign government finance minister officially ordered payment of a tax to the foreign government. See *Riggs Nat. Corp. v. CIR*, 163 F.3d 1363, 1368 (D.C. Cir. 1999). That order was set forth in a “private letter ruling, which under Brazilian law binds the parties.” *Id.* at 1366. More recently, this Court has applied the act of state doctrine to preclude a challenge to the validity of a foreign statute. *Society of Lloyd’s v. Siemon-Netto*, 457 F.3d 94, 102-103 (D.C. Cir. 2006). Other circuits have similarly emphasized the sovereign character of official action subject to the act of state doctrine. See, e.g., *Spectrum Stores v. Citgo Petroleum Corp.*, 632 F.3d 938, 954 (5th Cir. 2011) (“adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources * * * [which] is an inherently sovereign function”), pet. for cert. pending (No. 10-1371 filed May 5, 2011); *In re Philippine Nat’l Bank*, 397 F.3d 768, 773 (9th Cir. 2005) (applying act of state doctrine because litigation would require holding invalid a

forfeiture judgment entered by Phillippine supreme court, in an “action initiated by the Phillippine government pursuant to its statutory mandate to recover property allegedly stolen from the treasury,” which Ninth Circuit described as “governmental”) (internal quotation marks omitted); *Callejo v. Bancomer*, 764 F.2d 1101, 1115 n.15 (5th Cir. 1985) (“Here, there is no question that Mexico’s promulgation of the exchange control regulations was invested with the sovereign authority of the state. The decrees announcing the imposition of the controls were issued by the Mexican Ministry of Treasury and Public Credit and by President Lopez Portillo, and were later reiterated in legislative enactments.”); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) (a country acts in a “uniquely sovereign” capacity when it “regulate[s] its natural resources”).

Thus, the act of state doctrine generally prohibits United States courts from questioning the validity of a foreign government’s exercise of its sovereign authority in a manner unavailable to private entities—such as by enacting a statute, promulgating an official decree, or issuing a binding administrative decision—or a foreign government’s official action with respect to distinctly sovereign concerns, such as the regulation of natural resource exploitation. Here, the corporate decisions of Iran’s representatives on Pak Dairy’s board of directors do not come within those descriptions of sovereign activity, and the act of state doctrine accordingly does not apply.

C. We emphasize that the official action requirement is not equivalent to the determination of foreign sovereign immunity under the FSIA commercial activity exception. Nor does this case present the question whether there is a corollary commercial activity exception to the act of state doctrine. Resolution of that unsettled question is not necessary to a decision that the act of state doctrine does not apply here.

Even apart from the existence of such an exception, a jurisdictional determination that the foreign government’s conduct involved commercial activity under § 1605(a)(2) is not by itself a sufficient answer to the act of state inquiry. See *Callejo*, 764 F.2d at 1125-1126 (explaining that inquiries are distinct and applicability of FSIA commercial activity exception does not preclude determination that act of state doctrine applies). Notably, Iran does not appear to argue that the corporate decisions of its representatives on the Pak Dairy board of directors (to the extent the district court held that they were not compelled by currency exchange controls) constitute official actions of the government of Iran.

Apart from the question of a commercial activity exception, the Supreme Court’s decision in *Dunhill* provides an instructive example applying the public act (or official action) requirement of the act of state doctrine. There, the majority—including Justice Stevens, who did not endorse a possible commercial activity exception—declined to “draw * * * [the] conclusion” that “the conduct in question was the public act of those with authority to exercise sovereign powers.” *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976). The Court pointed out that “[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.” *Id.* at 695. The same can be said for the conduct at issue in this case.

Applying this threshold analytical inquiry—identifying whether the outcome of the litigation would turn upon the effect of official action by a foreign sovereign—demonstrates that the act of state doctrine does not apply according to the terms set forth by the Supreme Court in *Kirkpatrick*. ...

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3. Transpacific Passenger Air Transportation Antitrust Litigation

On January 21, 2011, the United States filed a statement of interest in the U.S. District Court for the Northern District of California in a case alleging that 26 airlines—including several national airlines—engaged in a conspiracy to fix prices of transpacific air passenger travel in violation of U.S. antitrust laws. *In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. 3:07-cv-05634-CRB, MDL No. 1913 (N.D. Cal. 2011). Several of the defendant airlines filed motions to dismiss, including motions asserting the act of state doctrine. In its statement, filed at the invitation of the court, the United States took no position on whether the act of state doctrine was implicated in the case, suggesting that:

Fact-finding by a court may cast light on whether the prerequisites of the act of state doctrine are present (e.g., whether the court must decide the validity of an official act, whether the relevant acts taken are “sovereign” acts, and whether the territorial requirements are met) and whether any exceptions to the act of state doctrine apply.

Statement of Interest of the United States, available at www.state.gov/s/l/c8183.htm. In its decision on the motions to dismiss, the court referred to the U.S. statement of interest in denying the motions to dismiss based on the act of state doctrine, allowing that the defendants could raise the argument again after conducting discovery in the case, at the summary judgment stage. *In re Transpacific Passenger Air Transportation Antitrust Litigation*, 2011 WL 1753738 (N.D. Cal. May 9, 2011).

4. Zivotofsky

See Ch. 9.C.

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Cross References

Immigration and nationality, **Chapter 1.**

International tribunals, **Chapter 3.C.**

Protection of migrants, **Chapter 6.F.**

Protecting power in Libya, **Chapter 9.A.**

Foreign Sovereign Immunity Act, **Chapter 10.A.**

Foreign official immunity, **Chapter 10.B.**

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On April 8, 2011, the Department of State released the 2010 Country Reports on Human Rights Practices. The Department of State submits the document annually to Congress in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. The reports are available at www.state.gov/q/drl/rls/hrrpt/2010 ; Secretary of State Hillary Rodham Clinton's remarks on the release of the reports are available at www.state.gov/secretary/rm/2011/04/160363.htm.

2. Periodic Report to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights

On December 30, 2011, the United States submitted the Fourth Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"), available at www.state.gov/j/drl/rls/179781.htm#iii. As explained in the introduction to the Fourth Periodic Report, the United States followed the guidelines of the Human Rights Committee in terms of the form and content of the report, which supplements information provided in the U.S. Initial Report of 1994 and information provided in the U.S. combined Second and Third Periodic Report of 2005. See *Cumulative Digest 1991-1999* at 873-78 and *Digest 2005* at 258-300 for background on previous U.S. periodic reports.

Paragraph 4 in the introduction to the report explained that the report reflects U.S. consideration of the views of the Committee and civil society:

In this report, the United States has considered carefully the views expressed by the Committee in its prior written communications and public sessions with the United States. In the spirit of cooperation, the United States has provided as much information as possible on a number of issues raised by the committee and/or civil society, whether or not they bear directly on formal obligations arising under the Covenant. During preparation of this report, the U.S. Government has consulted with representatives of civil society and has sought information and input from their organizations. Civil society representatives have raised a variety of concerns on many of the topics addressed in this report, a number of which are noted in the text of the report. The United States Government has also reached out to state, local, tribal, and territorial governments to seek information from their human rights entities on their programs and activities,

which play an important part in implementing the Covenant and other human rights treaties. Information received from this outreach is referenced in some portions of the report and described in greater detail in Annex A to the Common Core Document.

The report is comprehensive and covers a wide range of subjects, including law and practice in the United States to protect freedoms of speech, religion, association, peaceful assembly, non-discrimination, and privacy. It also addresses liberty of movement, due process and fair judicial procedures, and equality under the law. The report also covers the rights to be free from arbitrary arrest or detention, torture, cruel, inhuman, or degrading treatment or punishment, and slavery or involuntary servitude. Other subjects addressed by the report include expulsion of aliens and protection of children.

3. Human Rights Council

a. Overview

The United States participated in three regular sessions of the Human Rights Council in 2011. The Council convened for its 16th session in March. For U.S. statements and positions at the 16th session, see <http://geneva.usmission.gov/taq/16th-session/>. U.S. accomplishments at the 17th session, which concluded on June 17, are also described on the website of the U.S. Mission in Geneva at <http://geneva.usmission.gov/2011/06/21/u-s-accomplishments-at-u-n-human-rights-council%E2%80%99s-17th-session/>. Key accomplishments of the United States at the 18th session, which concluded on September 30, are summarized at <http://geneva.usmission.gov/2011/10/03/accomplishments-unhrc18/>.

On June 17, 2011, John F. Sammis, U.S. Deputy Representative to the Economic and Social Council (“ECOSOC”), provided an explanation of the U.S. vote on a resolution in the General Assembly on the Human Rights Council 2011 Review. The U.S. voted no because of its unfavorable view regarding the process and outcome of the Human Rights Council Review, a process authorized in the General Assembly resolution that established the Council in 2006. U.N. Doc. No. A/RES/60/251. Mr. Sammis’ statement is excerpted below and available at <http://usun.state.gov/briefing/statements/2011/166477.htm>.

* * * *

Thank you, Mr. President. In Geneva and New York, the United States has repeatedly urged our fellow members to join us in conducting a thorough, comprehensive review of the Human Rights Council that would significantly improve its ability to meet its core mission: promoting and protecting human rights.

Unfortunately, the Geneva process failed to yield even minimally positive results, forcing us to dissociate from the outcome. We appreciate the work that the co-facilitators have done in New York over the past months, but the final resolution before us also fails to address the core problems that still plague the Human Rights Council. We deeply regret that this opportunity has been missed. The United States has therefore voted “no” on the resolution.

The Council has had many significant achievements in recent weeks; including a historic resolution highlighting the human rights abuses faced by lesbian, gay, bisexual, and transgender persons around the world, a special session on Syria, the Commission of Inquiry in Libya, and the historic creation of a Special Rapporteur to investigate human rights violations in Iran. But the Council's effectiveness and legitimacy will always be compromised so long as one country in all the world is unfairly and uniquely singled out while others, including chronic human rights abusers, escape scrutiny.

The gravest of the Council's structural problems remains its politicized standing Agenda Item 7 on Israel. No member state during this Review has been able to explain how Item 7 is consistent with the principles clearly outlined in the resolution that established the Human Rights Council: "impartiality, non-selectiveness, and balance." This Review should have eliminated this unfair and unbalanced Agenda Item and instead ensured that all member states, including Israel, are treated on an equal and impartial basis. The Review is over, but this struggle is not. My government will continue to fight to remove this item and the biased and unfair resolutions that flow from it.

This Review also failed to tackle another fundamental issue: Council membership. The Council discredits, dishonors, and diminishes itself when the worst violators of human rights have a seat at its table. During the Review in New York, the United States put forward a proposal to ensure that GA members have real choices in Human Rights Council elections by calling on all regional groups, including our own, to run competitive slates. This was rejected out of hand. We were also dismayed that another much more modest proposal, which simply called on candidate states to hold an interactive dialogue about their human rights records with member states and civil society groups, was also blocked. These failures to address the critical problem of membership do a serious disservice to the Council and to the brave men and women around the world standing up for their universal rights. Let there be no doubt: membership on the Human Rights Council should be earned through respect for human rights, not accorded to those who abuse them.

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b. U.S. Universal Periodic Review

In 2011, the United States concluded its first Universal Periodic Review ("UPR") by making both written and oral submissions to the UN Human Rights Council. The United States submitted its report in connection with the UPR in 2010. A Working Group of the UPR made 228 recommendations to the U.S. based on its review of the report. See *Digest 2010* at 202-08 for excerpts from the U.S. report and the initial response of the U.S. to the recommendations of the Working Group. On March 4, 2011, the United States presented its written response to the 228 recommendations of the Working Group, grouping the recommendations into ten categories and identifying those which enjoy the support of the United States, those which enjoy U.S. support in part, and those which do not enjoy U.S. support, also providing a short explanation in many cases. The U.S. submission also included the following explanation of the decisions. The submission can be found in full at www.state.gov/g/drl/upr/157986.htm.

* * * *

3. What it means for a recommendation to enjoy our support needs explanation. Some recommendations ask us to achieve an ideal, e.g., end discrimination or police brutality, and others request action not entirely under the control of our Federal Executive Branch, e.g., adopt legislation, ratify particular treaties, or take action at the state level. Such recommendations enjoy our support, or enjoy our support in part, when we share the ideal that the recommendations express, are making serious efforts toward achieving their goals, and intend to continue to do so. Nonetheless, we recognize, realistically, that the United States may never completely accomplish what is described in the literal terms of the recommendation. We are also comfortable supporting a recommendation to do something that we already do, and intend to continue doing, without in any way implying that we agree with a recommendation that understates the success of our ongoing efforts.

4. Some countries added to their recommendations inaccurate assumptions, assertions, or factual predicates, some of which are contrary to the spirit of the UPR. In such cases, we have decided whether we support a recommendation by looking past the rhetoric to the specific action or objective being proposed. When we say we “support in part” such recommendations, we mean that we support the proposed action or objective but reject the often provocative assumption or assertion embedded in the recommendation.

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On March 18, 2011, State Department Legal Adviser Harold Hongju Koh made an oral presentation to conclude the United States’ first UPR. Excerpts follow from Mr. Koh’s statement, which can be found in full at <http://geneva.usmission.gov/2011/03/18/us-upr-adoption>.

* * * *

We have found the Universal Periodic Review a useful tool to assess how our country can continue to improve in achieving its own human rights goals. Civil society has been involved in each and every step of our UPR: from an unprecedented series of a dozen listening sessions that involved representatives of local and national civil society organizations as well as hundreds of citizens from communities across our country, to the Town Hall gathering for civil society held here last November in Geneva, and since then our Federal agencies have held numerous meetings with civil society to discuss our response to the many recommendations.

* * * *

When we presented our initial report last November, we received 228 recommendations. We have considered the substance of each and every one of the recommendations, even those whose tone suggests they were not offered in a constructive spirit. While our written submission provides a specific response to each recommendation, in my time today, let me discuss the ten

thematic areas these recommendations cover, and review significant changes that have occurred since our report last November.

First, we support many recommendations concerning civil rights and discrimination. . . . Our government has taken important recent steps in this regard, notably enactment on December 22, 2010, of the Don't Ask, Don't Tell Repeal Act, which will allow gay men and women to serve openly in our military. . .

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In a second area, criminal justice, the United States continues to work . . . to ensure protection under our Constitution and laws of the rights of those accused of committing crimes and held in prisons or jails. We set and enforce high standards of conduct for law enforcement personnel. In New Orleans, the Civil Rights Division recently secured convictions against police officers who engaged in misconduct in the wake of Hurricane Katrina. . . .

About 25 countries . . . also raised capital punishment as an issue of concern. While we respect those who make these recommendations, as I noted last November, they reflect continuing differences of policy, not differences about what the rules of international human rights law currently require. To those who desire as a matter of policy to end capital punishment in the United States—and I count myself among those—I note the decision made by the government of Illinois on March 9 to abolish that state's death penalty.

In a third area, the rights of indigenous peoples, the United States recognizes past wrongs and has committed itself to working with tribal governments to address the many issues facing their communities, including two particular recommendations. . . .

At his second White House Tribal Nations Conference last December, President Obama . . . announced the United States' support for the UN Declaration on the Rights of Indigenous Peoples, and issued a statement detailing U.S. support for the Declaration and ongoing work on Native American issues. His announcement capped a year in which the President had directed that consultations with tribal officials be reinvigorated throughout the U.S. Government.

Civil society and countries . . . made recommendations to us concerning a fourth area: national security. . . .

. . . [O]thers made recommendations about the Guantánamo detention facility. As the White House indicated last Monday, President Obama remains committed to closing that facility, although that will clearly take more time, due to restrictive legislation and complex politics. As this effort continues, we are committed to ensuring that all practices on Guantánamo fully accord with international law. On March 7, 2011, the President announced five steps reaffirming the framework first outlined in his 2009 National Archives Speech, to ensure we have a lawful, sustainable, and principled regime handling Guantánamo detainees consistent with our national security interests and our national values. The first element is a continued commitment to civilian trials in Federal courts . . . The second element is a resumption of prosecutions by military commissions, which had previously been suspended. Third, we continue efforts to lawfully and safely transfer detainees from Guantánamo. Fourth, the President formalized a process of periodic review, to ensure that individuals on Guantánamo are detained only when both lawful and necessary to protect U.S. security. Fifth and finally, we reaffirmed our commitment to humane treatment of detainees in our custody by announcing that the United States will seek advice and consent to Additional Protocol II of the Geneva Conventions and will

also—out of a sense of legal obligation – adhere to the humane treatment and fair trial safeguards in Article 75 of Additional Protocol I in international armed conflicts.

* * * *

In a fifth area, immigration, we accepted many recommendations . . .

In keeping with commitments relating to our status as party to the 1967 Protocol relating to the Status of Refugees, our government is reviewing its handling of emergent refugee cases to improve accessibility and efficiency in the program. Last December, the Department of Homeland Security improved accessibility of care for immigration detainees, by simplifying the process for detainees to receive authorized health care. And in January, the Department improved its procedures for handling, investigating, and correcting complaints regarding all kinds of civil rights issues. In 2010, the Department of Homeland Security provided 10,000 victims of crime and over 9,000 of their immediate family members with the opportunity to work and live permanently in the United States.

In a sixth area—economic, social, cultural, and environmental rights—...local, State, and Federal governments in the United States continue to protect the environment in which we live and to take significant action to address what President Roosevelt called “freedom from want.”

...

In a seventh area—workplace protections and the fight against human trafficking—the United States has long been a leader. . . . The U.S. Customs and Border Protection agency launched the “No Te Enganes” (Don’t Be Fooled) media campaign in Guatemala, El Salvador, and Mexico, which offers information on the dangers of human trafficking and advises how to avoid becoming a victim. Last year the Department of Justice prosecuted its highest annual number of human trafficking cases ever, including one involving more than 400 victims. We continue to address worker protections in countless ways, including through the President’s Equal Pay Taskforce to strengthen our response to wage differences between men and women, the Justice and Equality in the Workplace Program, and joint enforcement and education campaigns focused on civil rights of immigrant workers.

We are committed to an eighth goal as well—robust domestic implementation of our international human rights obligations. . . .

As a party to several human rights treaties, the United States is bound to comply with its obligations at Federal, State, and local levels. Under our Constitution and federal system of government, the different levels and branches of our government ensure a comprehensive web of protections and enforcement mechanisms that reinforce our country’s ability to guarantee respect of human rights.

The ninth and largest group of recommendations that we received concerned ratification of treaties and other international instruments. . . . [T]he Administration has pushed for positive Senate action on a number of human rights and other treaties that afford humanitarian protection, and will continue to do so. As I have noted earlier, eleven days ago the Administration announced its intent to seek, as soon as practicable, Senate advice and consent to ratify Additional Protocol II to the 1949 Geneva Conventions. . . . The U.S. also declared that, out of a sense of legal obligation, it will treat the principles set forth in Article 75 of Additional Protocol I as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

Tenth and finally, we address together a number of the recommendations made at the UPR that did not fit into other categories. As our written report says, we do not support recommendations that urged particular action in pending judicial cases. Nor do we support certain other inappropriate or politically motivated recommendations. Despite some countries' desire to use the UPR for their own political ends, we have worked, with respect for the process, to consider the merits of each and every one of the 228 recommendations made to us, and to respond honestly to each.

* * * *

c. Work of Special Representative: Guiding Principles on Business and Human Rights

In June 2011, at the UN Human Rights Council's 17th Session, the United States worked with the Government of Norway to pass a resolution that welcomed the work of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie of Harvard University. U.N. Doc. A/HRC/RES/17/4. Professor Ruggie developed the Guiding Principles on Business and Human Rights and built support for them among governments, corporations, and civil society stakeholders. The resolution created a working group of five independent experts and established a forum on business and human rights to discuss trends and challenges in implementing the Guiding Principles. The June 16, 2011 statement of Daniel Baer, Deputy Assistant Secretary of State for Democracy, Human Rights and Labor, on the resolution and the Guiding Principles is set forth below and available at <http://geneva.usmission.gov/2011/06/16/humanrightsandtransnationalcorps/>.

* * * *

The United States is pleased to cosponsor this resolution. The United States would like to thank and congratulate the Special Representative for the important progress he has made on this challenging issue, and express our support and commitment to working to make the vision of the Guiding Principles a reality where it matters most—on the ground for people and businesses. As the culmination of several years of work, the Guiding Principles provide a focal point for corporations, States, civil society and other actors as they work to strengthen their respective approaches to the issue of business and human rights.

In highlighting the importance of the Guiding Principles, we also want to take this opportunity to emphasize the essential foundation of the human rights system that remains an important backdrop for the Special Representative's work, namely, State obligations under human rights law with respect to their own conduct. In States that violate human rights, it will be more difficult for businesses to respect those rights—because domestic law may require actions inconsistent with internationally recognized human rights, because State practices encourage businesses to take actions that undermine the enjoyment of human rights, or because States involve businesses in their own human rights violations. In contrast, States that respect

human rights pursuant to their international legal obligations are more likely to create environments in which businesses are less likely to take actions that might undermine the enjoyment of human rights.

As the Guiding Principles remind us, it is important for States to govern justly and effectively, such that individuals are protected not only from misconduct by the State but also from non-State actors, including business enterprises. Our conviction regarding the State “duty to protect” is grounded in States’ moral and political imperative to engage in good governance, including by addressing properly acts of abuse by private actors. International human rights law tells us that, in certain circumstances, a State’s obligations can be implicated by private conduct, but we also have a solemn imperative as governments to provide for and improve the well-being of our populations, even where our obligations under international law do not require it.

While recognizing that the Guiding Principles themselves touch on certain unsettled issues that arise in a broader context, the United States believes that the Guiding Principles provide a valuable, important and complete framework for working through a wide range of challenges. We look forward to continuing to work with all stakeholders on their implementation with an eye to our ultimate goal: Improving the lives of people around the world.

* * * *

d. Actions regarding Libya

(1) Special Session

On February 25, 2011, the Human Rights Council convened a special session on Libya where it established a commission of inquiry on Libya. Secretary of State Hillary Rodham Clinton addressed the Council on February 28, 2011. Her remarks are excerpted below and available at www.state.gov/secretary/rm/2011/02/157412.htm.

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Today the world’s eyes are fixed on Libya. We have seen Colonel Qadhafi’s security forces open fire on peaceful protestors again and again. They have used heavy weapons on unarmed civilians. Mercenaries and thugs have been turned loose to attack demonstrators. There are reports of soldiers executed for refusing to turn their guns on their fellow citizens, of indiscriminate killings, arbitrary arrests, and torture.

Colonel Qadhafi and those around him must be held accountable for these acts, which violate international legal obligations and common decency. Through their actions, they have lost the legitimacy to govern. And the people of Libya have made themselves clear: It is time for Qadhafi to go—now, without further violence or delay.

The international community is speaking with one voice and our message is unmistakable. These violations of universal rights are unacceptable and will not be tolerated. This Council took an important first step toward accountability on Friday by establishing an independent commission of inquiry.

On Saturday in New York, the United Nations Security Council unanimously adopted a resolution imposing an arms embargo on Libya, freezing the assets of key human rights violators and other members of the Qadhafi family, and referring the Libyan case to the International Criminal Court.

Tomorrow, the UN General Assembly should vote to accept the recommendation to suspend the Qadhafi government's participation here in the Human Rights Council. Governments that turn their guns on their own people have no place in this chamber.

The Arab League deserves our praise as the first multilateral organization to suspend Libya's membership—despite the fact that Libya was serving as the Arab League Chair. We hope to see our friends in the African Union follow suit.

We all need to work together on further steps to hold the Qadhafi government accountable, provide humanitarian assistance to those in need, and support the Libyan people as they pursue a transition to democracy. Today, I've had the privilege of consulting with a wide range of colleagues here in Geneva and President Obama is meeting with UN Secretary General Ban Ki-moon in Washington. We will continue coordinating closely with our allies and partners.

The United States has already imposed travel restrictions and financial sanctions on Qadhafi and senior Libyan officials. We have frozen assets to ensure that they are preserved for the Libyan people. And we have halted our very limited defense trade with Libya. We are working with the United Nations, partners, allies, the International Committee of the Red Cross and the Red Crescent, and other NGOs to set up a robust humanitarian response to this crisis.

As we move forward on these fronts, we will continue to explore all possible options for action. As we have said, nothing is off the table so long as the Libyan Government continues to threaten and kill Libyans.

Ultimately, the people of Libya themselves will be the ones to chart their own destiny and shape their own new government. They are now braving the dictator's bullets and putting their lives on the line to enjoy the freedoms that are the birthright of every man, woman, and child on earth. Like their neighbors in Tunisia and Egypt, they are asserting their rights and claiming their future.

Now, while the circumstances in Egypt, Tunisia, and Libya are each unique, in every case the demand for change has come from within, with people calling for greater civil liberties, economic opportunities' and a stake in the governance of their own societies.

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Recent days have underscored the importance of the freedom of expression, whether it's in the public square, through the press, or on the internet. Brave journalists have broadcast images of repression around the world, and the young people of Tunisia and Egypt have shown everyone what a force for democracy, the open exchange of ideas, can be.

A vibrant civil society is also an indispensable building block of democracy. And not only in the Middle East but around the world, citizen activists and civic organizations are emerging as strong voices for progress. They help develop solutions to tough problems. They hold governments accountable. They empower and protect women and minorities. The United States is committed to broadening our own engagement with civil society, and we urge leader and governments to treat civil society, as partners, not adversaries.

There also must be for transitions to thrive a commitment to make economic opportunity available to all. Human rights, democracy, and development are inextricably linked and mutually

reinforcing. We have seen how inequity and lack of economic opportunities drive people into the streets. So to earn the confidence of one's own people, governments have to deliver on the promise of improved lives.

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The Human Rights Council was founded because the international community has a responsibility to protect universal rights and to hold violators accountable, both in fast-breaking emergencies such as Libya and Cote d'Ivoire, and in slow motion tragedies of chronic abuse, such as Burma and North Korea. We saw this Council at its best on Friday, when it took decisive action on Libya. We saw it in December's Special Session on Cote d'Ivoire, where the situation is increasingly dire and there's been a large spike in violence. We must continue sending a strong message to Laurent Gbagbo that his actions are unacceptable, and the international community must keep up the pressure.

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Make no mistake, this popular wave for reform is spreading, not receding. Each country is unique, but many of the concerns that drove people into the streets and squares of the Middle East are shared by citizens in other parts of the world. Too many governments are hobbled by corruption and fearful of change. Too many young people cannot find jobs or opportunities. Their prospects are shaped more by who they know than by what they know or what they can dream. But it is not my mother's or even my world any more. What has happened with new technologies of the 21st century means that young people know everything that is going on everywhere, and they no longer will tolerate a status quo that blocks their aspirations.

Young people in the Middle East have inspired millions around the world, and we celebrate what some are rightly calling the Arab Spring. This is a hopeful season for all humanity because the cause of human rights and human dignity belongs to us all.

So for leaders on every continent, the choice becomes clearer day by day: Embrace your people's aspirations, have confidence in their potential, help them seize it, or they will lose confidence in you.

Those of you who were here on Friday, and many of us watching on our television screens saw the Libyan representative renounce Qadhafi's violent rule. He said, "Young people in my country today are with their blood writing a new chapter in the history of struggle and resistance. We in the Libyan mission have categorically decided to serve as representatives of the Libyan people and their free will."

This is the call we should heed. This is a time for action. Now is the opportunity for us to support all who are willing to stand up on behalf of the rights we claim to cherish. So let us do that and let us do it with the sounds of the young people from the streets of Tripoli to the markets of Tunis and the squares of Cairo echoing in our ears.

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(2) Suspension of Libya from Membership

On March 1, 2011, the General Assembly unanimously voted to suspend Libya's rights of membership on the Human Rights Council, following a recommendation by the Human Rights Council in its resolution of February 25, 2011 that Libya's membership rights be

suspended “in view of the gross and systematic violations of human rights by the Libyan authorities.” UN Doc. A/HRC/RES/S-15/1. Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, announced the decision:

We had, just, a historic session of the General Assembly when all members unanimously agreed to the suspension of Libya’s membership from the Human Rights Council. This is the first time that either the Human Rights Council or its predecessor, the Human Rights Commission, have suspended any member state for gross violations of human rights. And we think this is an important step forward in enhancing the credibility of the Human Rights Council, whose credibility on these issues has often, quite legitimately, been called into question. Today, the General Assembly exercised its authority to suspend a member state for gross violations of human rights. In our view, this is progress, as was last Friday’s special session in Geneva for the Human Rights Council, and we hope its progress will be sustained.

Ambassador Rice’s remarks including responses to reporters’ questions are available at <http://usun.state.gov/briefing/statements/2011/157522.htm>. Ambassador Rice explained in her remarks that:

The protests in Libya are being driven by the people of Libya. This is about the universal human rights of the Libyan people and all people—and about a regime that has failed to meet its responsibility to protect its own population. The United States was pleased to co-sponsor this resolution along with partners from all regions of the world, which underscores the universality of this decision and the depth of our commitment to the human rights we all share.

The full text of Ambassador Rice’s remarks is available at <http://usun.state.gov/briefing/statements/2011/157518.htm>.

On November 18, 2011, the General Assembly adopted Resolution 66/11, restoring Libya’s rights of membership in the Human Rights Council. The United States voted in favor of the resolution, which passed by a margin of 123 in favor, 4 against, with 6 abstaining. Ambassador Rice issued a statement welcoming the reinstatement. Her statement is excerpted below and available in full at <http://usun.state.gov/briefing/statements/2011/177356.htm>. Ambassador Jeffrey DeLaurentis, United States Alternate Representative for Special Political Affairs, also delivered a statement on Libya’s return to the Council, which is available at <http://usun.state.gov/briefing/statements/2011/177360.htm>.

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The reinstatement of Libya to the UN Human Rights Council marks the start of a new opportunity for the Libyan people. The General Assembly’s unanimous suspension of Libya nearly nine months ago was an extraordinary and historic response to a vicious, indiscriminate

campaign of violence by the Qadhafi regime. With strong support from nations in the Middle East and every region of the world, the international community demonstrated that it would not turn a blind eye to one ruler's shameful treatment of his own people.

Today's reinstatement is a significant achievement for the Human Rights Council, which demonstrated commendable leadership in requesting Libya's suspension. It is also a strong step towards regularization of Libya's role in the international system and a statement of solidarity with the Libyan people, who have made extraordinary sacrifices to pursue an inclusive and democratic future that respects and protects human rights.

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e. Actions regarding Syria

Throughout 2011, the Human Rights Council focused on the human rights crisis in Syria, where the Government of Syria repeatedly used violent means to repress peaceful protestors. In April, the Council convened a Special Session and passed a resolution on Syria that included a request that the UN Office of the High Commissioner for Human Rights ("OHCHR") dispatch urgently a mission to Syria to investigate all alleged violations of international human rights law. In August, the Council again convened a Special Session on Syria and passed a resolution mandating a Commission of Inquiry. In November, the Commission of Inquiry issued its first report. And in December, the Council again convened a Special Session and passed another resolution on Syria that established a special rapporteur on the situation of human rights in Syria after the end of the mandate of the Commission of Inquiry. These actions are discussed below.

(1) Special Session on Syria in April (16th Special Session)

Ambassador Eileen Chamberlain Donahoe, U.S. Representative to the Human Rights Council, addressed the Special Session on April 29, 2011 in Geneva. Her remarks are excerpted below and available in full at <http://geneva.usmission.gov/2011/04/29/hrc-special-session-on-syria-statement-by-ambassador-donahoe/>.

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The purpose of this Special Session of the Human Rights Council is to make clear that the international community strongly condemns the killing, arrest and torture of peaceful protestors taking place in Syria, even as we speak. To the Syrian Government, we are sending a clear and unequivocal message that we will not turn a blind eye as you arbitrarily imprison, torture, and kill your own citizens. To the brave people of Syria, who are demanding freedom and dignity, we are here to say that the world stands by you, and we will not ignore your plight.

Members of the Human Rights Council are gathered today to express our outrage at the extreme violence used by the Syrian government to silence their citizens' universal rights to freedom of expression, peaceful assembly, and participation in the affairs of their state. We

condemn their brutal methods of silencing dissent, through shooting unarmed peaceful demonstrators and torture.

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We note that the Secretary-General, the High Commissioner for Human Rights, and a group of ten UN special procedure mandate holders, have called on the Syrian government to stop the excessive use of force against peaceful protestors, and called for investigations on and accountability for the abuses. We remind all that security professionals are personally accountable if they carry out unlawful orders to kill peaceful protestors. We also are concerned about restrictions on freedom of movement within Syria and reports that the Syrian government is denying access to border crossings out of Syria, which violates the right to leave one's country. The Syrian government's censorship, control of media, and restrictions on journalists and internet access is deeply troubling.

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On April 29, the Human Rights Council adopted a resolution by a vote of 26 to 9 with 7 abstentions, condemning the Syrian Government for its use of violence in response to its citizens' peaceful exercise of their right to freedom of expression. U.N. Doc. A/HRC/RES/S-16/1. Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, issued a statement hailing the resolution. Ambassador Rice's statement is available at <http://usun.state.gov/briefing/statements/2011/162200.htm>. Secretary Clinton also issued a statement on April 29 on the Special Session, which is excerpted below and available at <http://geneva.usmission.gov/2011/05/02/clinton-hrc-ss-syria/>.

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Today the UN Human Rights Council took urgent action to shine a light on the deteriorating human rights situation in Syria and condemn the continued human rights abuses by the Syrian government. Today's resolution—passed with an overwhelming majority by members from all regions of the globe—unequivocally indicates that the use of force by the Syrian government to quell peaceful political demonstrators is unacceptable. The international community has spoken and expressed its outrage at the violence used by the Syrian government to deny its population their universal human rights, including the freedoms of expression and assembly.

The Council's forceful statement, coupled with its decision to establish an urgent investigation led by the Office of the High Commissioner for Human Rights, ensures that the international community will remain actively engaged in the human rights crisis in Syria.

The Council also called upon the Syrian government to immediately release all prisoners of conscience and arbitrarily detained persons, including those who were detained before the recent events, and to immediately cease any intimidation, persecution and arbitrary arrests of individuals, including lawyers, human rights defenders and journalists.

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On June 15, at the 17th Session of the Human Rights Council, a group of over 50 nations agreed on a Joint Statement condemning the Syrian government's ongoing repression of its citizens' rights. The United States joined and strongly supported the Joint Statement, as explained in the statement of Ambassador Donahoe, available at <http://geneva.usmission.gov/2011/06/15/human-rights-council-statement-on-syria-shows-international-community%E2%80%99s-resolve/>. The State Department Spokesperson also issued a statement expressing the strong support of the United States for the Joint Statement, available at <http://geneva.usmission.gov/2011/06/16/us-and-over-50-un-members-issue-forceful-statement-on-deteriorating-human-rights-situation-in-syria/>.

(2) Special Session on Syria in August (17th Special Session)

Another Special Session on Syria convened in August. On August 22, 2011, Ambassador Donahoe addressed the Special Session on Syria. Her statement, excerpted below, is available in full at <http://geneva.usmission.gov/2011/08/22/ambassador-donahoe-the-syrian-people-cannot-wait/>.

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The human rights situation in Syria is extremely grave and deteriorating. The death toll continues to rise. Regime security forces continue to engage in house-to-house raids, mass arrests, and the torture of prisoners. We have heard multiple accounts from human rights groups of the Assad regime's security forces interrogating and abusing detainees in large facilities such as stadiums and factories. There are also credible reports of detainees being tortured to death and of bodies returned to families bearing signs of torture.

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The United States deplores Assad's campaign of ever-increasing brutality and terror against unarmed innocents, which may amount to crimes against humanity. The regime's horrific actions – the systematic violence, the mass arrests, and the outright murder of civilians – show its disdain for the will of the Syrian people, and for the calls of the Arab League, the Gulf Cooperation Council, regional leaders and the international community to end the violence immediately.

Assad's chosen course also defies the clear demands contained in the UN Security Council's Presidential Statement. And the regime's continued assault on civilians flies in the face of a commendable initiative by the Turkish government, which warned the Assad regime that it must halt its attacks on civilians immediately and unconditionally.

This is not the work of the fictional "armed gangs" invoked by Assad's propagandists. The regime has made a conscious choice to continue to deploy security forces throughout the country to prevent demonstrations, to attack civilians, and to arrest activists and protesters on a

massive scale. The Assad regime has no intention of ceasing its violent attacks against the Syrian people.

We welcome the recent report of the Syria Fact Finding Mission, called for at this Council's April 29 Special Session. We also welcome the statements made by the Security Council, including the August 3 Presidential Statement. Today we must take firmer actions to halt the ongoing crackdown against the Syrian people. The United States supports the call for an international, transparent, independent and prompt investigation into alleged violations of international human rights law by Syrian authorities. And we will work with our partners so that those responsible for crimes will be held accountable, either through the courts of a democratic Syria or through international processes.

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Also on August 22, Ambassador Donahoe delivered the U.S. explanation of vote on the resolution on Syria passed by the Human Rights Council at its August Special Session by a vote of 33 to 4, with 9 abstentions. Ambassador Donahoe's statement appears below and is available at <http://geneva.usmission.gov/2011/08/23/ambassador-donahoe-says-hrc-vote-shows-growing-consensus-that-assad-has-lost-legitimacy-to-govern/>.

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The passage today of the Human Rights Council resolution on the Human Rights Situation in Syria sends several important messages:

First, there is a very strong and growing consensus in the international community that Assad has lost legitimacy to govern and must step down.

The outcome manifests the extent to which he is now isolated.

Second, through this resolution, the international community sent a clear message to the Syrian people: We will not stand by silently as innocent civilians and peaceful protesters are slaughtered by security forces. We are working to ramp up pressure on the Syrian authorities to help ensure that the violence ends.

We have not been fooled by empty promises of reform and engagement.

Actions speak louder than words: the continuing atrocities have sent a loud and clear message to us all that Assad's promises cannot be trusted.

The Commission of Inquiry established by the resolution will ensure that evidence of atrocities will be uncovered and those responsible will be identified and held accountable.

Today's outcome is a victory for the Syrian people.

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As indicated in Ambassador Donahoe's statement above, the resolution passed by the Human Rights Council at its Special Session on Syria in August mandated the establishment of a Commission of Inquiry. U.N. Doc. A/HRC/RES/S-17/1. Specifically, operative paragraph 13 of the resolution stated that the HRC:

Decides to dispatch urgently an independent international commission of inquiry, to be appointed by the President of the Human Rights Council, to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.

On August 23, Secretary Clinton issued a statement congratulating the HRC for its resolution mandating a Commission of Inquiry into the situation in Syria. Secretary Clinton's statement is set forth below and also available at <http://geneva.usmission.gov/2011/08/24/secretary-clinton-syria/>.

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I congratulate the Human Rights Council for its work to create an international independent Commission of Inquiry to investigate the deteriorating human rights situation in Syria and to make clear the world's concern for the Syrian people. Today, the international community joined together to denounce the Syrian regime's horrific violence. The United States worked closely with countries from every part of the world—more than 30 members of the Human Rights Council, including key Arab members—to establish this mandate.

The Commission of Inquiry will investigate all violations of international human rights law by Syrian Authorities and help the international community address the serious human rights abuses in Syria and ensure that those responsible are held to account.

There are credible reports that government forces in Syria have committed numerous gross human rights violations, including torture and summary executions in their crackdown against opposition members. The most recent attack by Syrian security forces on protesters in Homs is as deplorable as it is sadly representative of the Asad regime's utter disregard for the Syrian people.

The United States condemns in the strongest possible terms the slaughter, arrest, and torture of peaceful protesters taking place in Syria. We continue to urge nations around the world to stand with the Syrian people in their demands for a government that represents the needs and will of its people and protects their universal rights. For the sake of the Syrian people, it is time for Asad to step aside and leave this transition to the Syrians themselves.

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(3) First report of the Commission of Inquiry

On November 23, 2011, the Commission of Inquiry established by HRC Resolution S-17/1 issued its first report. U.N. Doc. A/HRC/RES/S-17/2/Add.1. Ambassador Donahoe welcomed the release of the report in a November 28 statement, available at <http://geneva.usmission.gov/2011/11/28/syria-coi/>:

The Commission's findings confirm what we have been hearing for several months—that on a nearly daily basis the Assad regime is killing peaceful demonstrators and committing arbitrary detentions, torture, and other serious human rights violations. This report amplifies an already growing chorus of international condemnation and call for action. It is clear to anyone who reads it that Assad's unwillingness to end his regime's violence is taking Syria down a very dangerous path despite efforts led by the Syrian people to start a peaceful transition to democracy.

(4) Special Session on Syria in December (18th Special Session)

On December 2, 2011, at its 18th Special Session, the HRC adopted another resolution on Syria by a vote of 37 to 4, with 6 abstentions. U.N. Doc. A/HRC/RES/S/18-1. Resolution 18-1 established the mandate of a special rapporteur to assume responsibilities for monitoring the human rights situation in Syria at the end of the mandate of the Commission of Inquiry. Ambassador Donahoe delivered a statement welcoming again the report of the Commission of Inquiry and further decrying the ongoing repression of human rights in Syria. Ambassador Donahoe's December 2 statement, excerpted below, is available in full at <http://geneva.usmission.gov/2011/12/02/us-statement-special-session-syria/>.

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The United States welcomes the forceful report of the Commission of Inquiry. I want to highlight the Commission's recommendations for the immediate admission and protection of human rights monitors; for the unfettered admission of international media; and for the United Nations to continue to take steps to halt the violence in Syria. This special session today, and the resolution before it, move these recommendations forward.

We once again call on the Syrian regime to immediately admit the Commission of Inquiry and grant it unfettered access throughout Syria. Similarly, Syria must immediately admit Arab League monitors, independent human rights monitors, and humanitarian organizations, with no restrictions on their activities.

We condemn in the strongest possible terms the ongoing slaughter, the arbitrary arrest, and the torture of peaceful protestors. We will continue to work with regional partners and the broader international community to pressure the Assad regime to end the violence against the Syrian people. The Syrian government's abuses have been condemned by leaders of the Arab world, including by the actions taken by the Arab League over the past week; by other international leaders; and by the United Nations, where just over one week ago in a vote in the General Assembly's Third Committee, 122 members of the United Nations stood together to call for an immediate end to the violence in Syria.

Our message is firm and clear:

- To the people of Syria—the world stands by you, and we will not ignore your plight in the face of ongoing violence;
- To the Syrian Government—the time has come to end the flagrant violations of the human rights of your people, and to allow Syrians their right to peacefully and democratically change their government.

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B. DISCRIMINATION

1. Race

a. Overview

In 2011 the United States continued to promote implementation by States Parties of their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and to advocate international cooperation to combat racial discrimination. The United States also pursued its domestic efforts to counter racial discrimination and stressed its view that combating racial discrimination and intolerance must not and need not occur at the expense of the right to freedom of expression.

b. Durban follow-up and tenth anniversary commemorations

(1) Human Rights Council

Throughout 2011, when UN bodies or other States raised issues relating to the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa and the Durban Declaration and Programme of Action (“DDPA”) and its follow-up, the United States continued to articulate its longstanding concerns with the conference, its outcome document, and the outcome document of the 2009 Durban Review Conference. For background see *Digest 2001* at 267-68, *Digest 2007* at 315-17, *Digest 2008* at 284-85, *Digest 2009* at 174-75 and *Digest 2010* at 222-23. For example, on March 25, 2011, the United States disassociated from consensus on the resolution renewing the mandate of the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance at the 16th Session of the Human Rights Council. U.N. Doc. A/HRC/RES/16/33. The U.S. explanation of position, set forth below, is available at <http://geneva.usmission.gov/2011/03/25/eop-racism/>.

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The United States has consistently sought to support practical and concrete efforts to end racism and racial discrimination wherever it occurs. We feel there is an important role for a Special Rapporteur on racism and have worked constructively over the past several years to focus his work on ensuring that all states live up to their obligations under the International Convention on

the Elimination of All Forms of Racial Discrimination (ICERD) and other practical measures to bring the promise of that Convention and other instruments barring racism and racial discrimination to fruition. We cannot, however, endorse all of the provisions of the current mandate as delineated in the prior resolution, language which we believe neither reflects international law nor appropriate policy.

It is, therefore, with sincere regret that the United States must disassociate from consensus on the resolution before us. Our position on the Durban Declaration and Programme of Action is well known. We have been careful to identify those parts of the Durban process that we find neither relevant nor practical in guiding the Council's work in combating racism. We cannot endorse full implementation of the DDPA. We have also been careful to communicate the importance of balancing necessary legal protections for freedom of expression with solutions to the problem of incitement. As such, we cannot accept the language of the mandate as currently conceived.

We will continue to look for ways to balance our differences with the overriding goal we all share to eliminate racism in all its forms, wherever it occurs. We are proud of the efforts we have made in that regard and will continue to seek consensus on practical ways to make progress on that worthy objective.

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Similarly, on September 30, 2011, the United States disassociated from consensus on the resolution on the mandate of the Working Group of Experts on Peoples of African Descent at the 18th Session of the Human Rights Council. U.N. Doc. A/HRC/RES/18/28. The United States delivered the following explanation of position, available at <http://geneva.usmission.gov/2011/09/30/eop-peopleofafricandescent/>.

* * * *

The United States is profoundly committed to ending racism and racial discrimination. We remain fully and firmly committed to upholding the human rights of all people and to combating racial discrimination, xenophobia, intolerance, anti-Semitism and bigotry, including by enhancing our implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. This commitment is rooted in the saddest chapters of our history and reflected in the most cherished values of our union. We will continue to work in partnership with all nations of goodwill to uphold human rights and combat racism, bigotry, and racial discrimination in all forms and all places.

Nevertheless our concerns about the DDPA are well known and we cannot therefore endorse all efforts undertaken by the Working Group in this regard. The US will therefore disassociate from consensus on the resolution before us. Since its inception at the 2001 World Conference Against Racism in Durban, South Africa, the Durban process has included ugly displays of intolerance and anti-Semitism. In 2009, after working to try to achieve a positive, constructive outcome in the Durban Review Conference that would get past the deep flaws of the Durban process to date to focus on the critical issues of racism, the United States withdrew from participating because the review conference's outcome document reaffirmed, in its entirety, the

Durban Declaration and Programme of Action (DDPA) from 2001, which unfairly and unacceptably singled out Israel. The DDPA also endorsed overbroad restrictions on freedom of expression that run counter to the U.S. commitment to robust free speech.

We are confident that beneath our shared differences, we share the same goals and we are proud of efforts we have jointly made in this and other forums to underscore this fact. We support the objective of the Working Group to explore means of combating racial discrimination against persons of African descent around the world. This topic is important to us, and we want to be able to support it. The United States supported declaring 2011 the UN Year of People of African Descent and has worked on important programs to combat racism, including special sessions at the OAS, bilateral work with Brazil and Colombia, and programming at our embassies around the world.

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The United States reiterated its concerns with the Durban process in a statement at the 18th Session of the Human Rights Council on September 27, 2011 on Item 9: “Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action,” available at <http://geneva.usmission.gov/2011/09/27/durban-declaration-and-programme-of-action/>.

(2) General Assembly

The United States did not participate in the commemoration in September 2011 of the 10-year anniversary of the 2001 Durban Conference. The White House issued a press statement on September 22, 2011 explaining the decision not to participate. That statement appears below and is available at www.whitehouse.gov/the-press-office/2011/09/22/statement-press-secretary-10th-anniversary-durban-conference.

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Several months ago, the United States announced that we would not participate in the 10-year commemoration of the 2001 Durban Conference. Consistent with that decision, we are not attending today’s high level event in New York.

Since its inception at the 2001 World Conference Against Racism in Durban, South Africa, the Durban process has included ugly displays of intolerance and anti-Semitism. In 2009, after working to try to achieve a positive, constructive outcome in the Durban Review Conference that would get past the deep flaws of the Durban process to date to focus on the critical issues of racism, the United States withdrew from participating because the review conference’s outcome document reaffirmed, in its entirety, the Durban Declaration and Programme of Action (DDPA) from 2001, which unfairly and unacceptably singled out Israel. The DDPA also endorsed overbroad restrictions on freedom of expression that run counter to the U.S. commitment to robust free speech.

Last December, the United States voted against the resolution establishing the commemoration because we did not want to see the hateful and anti-Semitic displays of the 2001 Durban Conference commemorated.

Over the last few months, we did not participate in negotiations on the Commemoration's Political Declaration document and, like many other countries, we were not present when the Declaration was adopted. We are also deeply disappointed that the rules established for credentialing non-governmental organizations to participate were used by some delegations to silence voices critical of the Durban process.

The United States is profoundly committed to ending racism and racial discrimination. We remain fully and firmly committed to upholding the human rights of all people and to combating racial discrimination, xenophobia, intolerance, anti-Semitism and bigotry, including through enhanced implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. This commitment is rooted in the saddest chapters of our history and reflected in the most cherished values of our union. We will continue to work in partnership with all nations of goodwill to uphold human rights and combat racism, bigotry, and racial discrimination in all forms and all places.

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c. Other issues relating to protecting freedom expression while countering racism or intolerance

In statements at the Human Rights Council and the UN General Assembly Third Committee, the United States emphasized the need to protect freedom of expression even while attempting to combat racism. On September 27, 2011, U.S. delegate Amira Fouad delivered the U.S. statement at the 18th Session of the Human Rights Council on "Item 9: Clustered Interactive Dialogue with the Special Rapporteur on Contemporary Forms of Racism, and the Working Group of Experts on People of African Descent." The statement appears below and is available at <http://geneva.usmission.gov/2011/09/27/efforts-to-combat-racism-must-also-preserve-robust-freedom-of-expression/>.

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The United States expresses its appreciation to the Special Rapporteur on Racism and the Working Group of Experts on People of African Descent for drawing attention to the continued vigilance that is needed in order to combat racism and to eliminate all forms of racial discrimination. We condemn racism of any kind for any purpose by any person or group against any person or group. We have worked hard at every level to combat racism, including:

- Domestically, we take seriously our obligations as a State Party to the International Convention on the Elimination of all Forms of Racial Discrimination. The United States implements these obligations through the operation of the U.S. Constitution, state constitutions, and local laws, together with the federal and state machinery charged with protecting human rights. Our laws prohibit discrimination based on race in all areas of life, from education to housing to employment. We work to ensure that hate crimes are prosecuted, that law enforcement misconduct is investigated and remedied, and that our

laws and programs ensure fair housing, fair lending, equal educational opportunity, equal employment opportunity and the right to vote are enjoyed by all, without regard to race.

- Bilaterally, we have co-funded and cooperated in anti-racism programs around the world, such as the U.S.-Brazil Joint Action Plan to Eliminate Racial and Ethnic Discrimination and Promote Equality and the U.S.-Colombia Action Plan to Promote Racial and Ethnic Equality; and
- Multilaterally, we have pledged \$650,000 to UNESCO to develop an anti-racism curriculum; provided resources to the Inter-American Commission on Human Rights Rapporteur on the Rights of Afro-descendants and against Racial Discrimination; and joined other countries in the Western Hemisphere to focus on the International Year for People of African Descent.

But the United States believes that even the best-intentioned efforts to combat racism must also preserve robust freedom of expression. We are concerned that the Special Rapporteur, for example, recommends that States prohibit advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence; dissemination of ideas based on racial superiority or hatred; and incitement to racial discrimination. He also invokes the limitations in Articles 19-22 of the International Covenant on Civil and Political Rights, apparently to suggest that States should control the Internet or other new technologies to prevent extremists from spreading material that is deemed racist. In its recommendations, the Working Group invokes Article 4 of the International Covenant on the Elimination of Racial Discrimination to underline the need to criminalize racism.

We remain deeply concerned about speech that advocates national, racial, or religious hatred, particularly when it seeks to incite imminent violence, discrimination, or hostility. But based on our own experience, the United States remains convinced that the best antidote to offensive speech is not bans and punishments but a combination of three key elements: robust legal protections against discrimination and hate crimes, proactive government outreach to racial and religious groups, and the vigorous speech that challenges the premises and conclusions of hateful speech.

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Likewise, in an explanation of vote delivered by U.S. Deputy Representative Sammis on November 17, 2011, the United States expressed concern that a Third Committee resolution, U.N. Doc. A/C.3/66/L.60 on “Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance” did not adequately account for the need to protect freedom of expression. Mr. Sammis’ statement follows and is available at

<http://usun.state.gov/briefing/statements/2011/177340.htm>.

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The United States supports many elements of this resolution. We join other members of the Third Committee in expressing revulsion at any attempt to glorify or otherwise promote Nazi ideology. The United States has been a strong supporter of the UN’s efforts to remember the

Holocaust and has a deep commitment to honoring the memory of the millions of lives lost. We also condemn without reservation all forms of religious intolerance or hatred.

We remain concerned, however, that the resolution fails again this year to distinguish between actions and statements that, while offensive, should be protected by freedom of expression, and criminal actions motivated by bias that should always be prohibited. The United States shares the concern expressed in this resolution regarding increases in the number of racist incidents expressed in any medium or forum, including on the Internet.

However, we do not consider curtailing expression to be an appropriate or effective means of combating racism and related intolerance. Rather, it is our firm conviction, as reflected in the U.S. Constitution and laws of the United States, that individual freedoms of speech, expression and association should be robustly protected, even when the ideas represented by such expression are full of hatred. It is for this reason that the United States has taken a reservation to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. We remain convinced of the need for this reservation.

In a free society hateful ideas will fail on account of their own intrinsic lack of merit. The best antidote to intolerance is not criminalizing offensive speech but rather a combination of robust legal protections against discrimination and hate crimes, proactive government outreach to minority religious groups, and the vigorous defense of both freedom of religion and freedom of expression.

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d. OAS Resolution on the Draft Inter-American Convention Against Racism

On June 7, 2011, the General Assembly of the Organization of American States (“OAS”) adopted a resolution at its fourth plenary session relating to the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance. AG/RES. 2677 (XLI-O/11). Operative Paragraph 2 of the resolution extended the mandate of the Working Group of the Committee on Juridical and Political Affairs to “entrust it with the preparation of legally binding instruments with due consideration of a convention against racism and racial discrimination, as well as an optional protocol or protocols that would, in addition, address all other forms of discrimination and intolerance....” Footnote 2 of the resolution noted the United States’ opposition to negotiating such a legally binding instrument:

The United States reserves on all references in the resolution to the negotiation of any legally binding instrument to combat racism, racial discrimination and other forms of discrimination or intolerance because of its longstanding position that the Working Group should not negotiate a new convention against racism, racial discrimination and other forms of discrimination or intolerance. The International Convention on the Elimination of All Forms of Racial Discrimination, to which some 170 countries are States Parties, including 33 members of this organization, prohibits discrimination on the basis of race, color, descent, or national or ethnic origin, and obliges States Parties to “undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.” As this robust global treaty regime already provides

comprehensive protections in this area, a regional instrument is not necessary and runs the risk of creating inconsistencies with this global regime. As early as 2002, the Inter-American Juridical Committee articulated similar concerns, concluding that it was not advisable to negotiate a new convention in this area. The United States believes that the resources of the OAS and of its member states would be better utilized at identifying practical steps that governments in the Americas might adopt to combat racism, racial discrimination and other forms of discrimination and intolerance, including best practices in the form of national legislation and enhanced implementation of existing international instruments. Such efforts should be aimed at bringing immediate and real-world protection against discrimination.

2. Gender

a. Women, Peace, and Security

In 2011, both the Obama Administration and the United Nations took steps to recognize and promote the important role of women in conflict resolution and promoting and maintaining peace. Some of those initiatives, which follow on UN Security Council Resolution 1325 and related resolutions, are discussed below. See *Digest 2010* at 232-35 for a discussion of the efforts to implement Resolution 1325 as of its tenth anniversary.

(1) The United States National Action Plan on Women, Peace, and Security

On December 19, 2011, President Obama issued Executive Order 13595 directing that the executive branch have and begin to implement a National Action Plan on Women, Peace, and Security (“National Action Plan”). 76 Fed. Reg. 80,205 (Dec. 23, 2011). Among the areas for U.S. Government activities and initiatives identified in E.O. 13595 are women’s “participation in peace processes and decisionmaking” in conflict-affected environments and “conflict prevention.” The National Action Plan was issued on December 19, 2011 and is available at www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf. The Plan provides a statement of policy, excerpted below.

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The goal of this National Action Plan on Women, Peace, and Security is as simple as it is profound: to empower half the world’s population as equal partners in preventing conflict and building peace in countries threatened and affected by war, violence, and insecurity. Achieving this goal is critical to our national and global security.

Deadly conflicts can be more effectively avoided, and peace can be best forged and sustained, when women become equal partners in all aspects of peace-building and conflict prevention, when their lives are protected, their experiences considered, and their voices heard.

As directed by the Executive Order signed by President Obama entitled Instituting a National Action Plan on Women, Peace, and Security, this Plan describes the course the United States Government will take to accelerate, institutionalize, and better coordinate our efforts to advance women's inclusion in peace negotiations, peacebuilding activities, and conflict prevention; to protect women from sexual and gender-based violence; and to ensure equal access to relief and recovery assistance, in areas of conflict and insecurity. ...

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Above all, this National Action Plan expresses the United States' unqualified commitment to integrating women's views and perspectives fully into our diplomatic, security, and development efforts—not simply as beneficiaries, but as agents of peace, reconciliation, development, growth, and stability. We welcome this opportunity to work with our international partners to make the promise of this commitment real, to advance implementation of United Nations (UN) Security Council Resolution 1325, and to make significant progress toward the goal of sustainable peace and security for all.

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A White House Fact Sheet issued on the same day and available at www.whitehouse.gov/the-press-office/2011/12/19/fact-sheet-united-states-national-action-plan-women-peace-and-security summarized the objectives of the Plan and the commitments of U.S. government agencies under the Plan. The White House Fact Sheet is excerpted below.

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...Together, the Executive Order and *National Action Plan* chart a roadmap for how the United States will accelerate and institutionalize efforts across the government to advance women's participation in preventing conflict and keeping peace. The documents represent a fundamental change in how the U.S. will approach its diplomatic, military, and development-based support to women in areas of conflict, by ensuring that their perspectives and considerations of gender are woven into the fabric of how the United States approaches peace processes, conflict prevention, the protection of civilians, and humanitarian assistance.

The *National Action Plan* contains commitments by the Departments of State, Defense, Justice, Treasury, and Homeland Security, and the U.S. Mission to the United Nations, the U.S. Agency for International Development (USAID), the Centers for Disease Control and Prevention, and the Office of the United States Trade Representative targeted at meeting the following national objectives:

- **National Integration and Institutionalization:** Through interagency coordination, policy development, enhanced professional training and education, and evaluation, the United States Government will institutionalize a gender-responsive approach to its diplomatic, development, and defense-related work in conflict-affected environments.

- **Participation in Peace Processes and Decision-making:** The United States Government will improve the prospects for inclusive, just, and sustainable peace by promoting and strengthening women's rights and effective leadership and substantive participation in peace processes, conflict prevention, peacebuilding, transitional processes, and decision-making institutions in conflict-affected environments.
- **Protection from Violence:** The United States Government will strengthen its efforts to prevent—and protect women and children from—harm, exploitation, discrimination, and abuse, including sexual and gender-based violence and trafficking in persons, and to hold perpetrators accountable in conflict-affected environments.
- **Conflict Prevention:** The United States Government will promote women's roles in conflict prevention, improve conflict early-warning and response systems through the integration of gender perspectives, and invest in women and girls' health, education, and economic opportunity to create conditions for stable societies and lasting peace.
- **Access to Relief and Recovery:** The United States Government will respond to the distinct needs of women and children in conflict-affected disasters and crises, including by providing safe, equitable access to humanitarian assistance.

In line with these objectives, agencies will:

- Establish and improve policy and training on Women, Peace, and Security;
- Advocate for the integration of women and gender perspectives in negotiations concerning conflict resolution, peacebuilding, and political transitions, including through U.S. delegations serving as a model;
- Build women's capacity for roles in local and national government, the security sector, and civil society in conflict-affected environments, while supporting NGOs that advocate on behalf of women's participation in decision-making;
- Work with partner nations to develop laws and policies that promote and strengthen women's rights and women's participation in security-related decision-making bodies;
- Improve the capacity of the UN system, peacekeepers, partner militaries and law enforcement, and implementing contractors and aid workers to better prevent and respond to conflict-related violence against women, including sexual and gender-based violence, sexual exploitation and abuse, and trafficking in persons;
- Ensure conflict early-warning systems include gender-specific data and are responsive to sexual and gender-based violence, while investing in women and girls as a means to reduce the long-term drivers of conflict; and
- Promote women's equal access to aid distribution mechanisms and services, support access to reproductive health in emergencies, and ensure that U.S. government crisis response and recovery teams have access to gender expertise.

To ensure comprehensive follow-through, agencies will be held accountable for their commitments under the *National Action Plan*. As directed by the Executive Order, the Departments of State and Defense, and USAID will designate officers to ensure implementation, and will submit to the National Security Advisor agency-specific plans establishing time-bound, measurable, resourced actions. These plans will be coordinated by a standing interagency committee chaired by the White House National Security Staff. This committee will:

- Monitor and evaluate actions taken in support of national objectives through the creation of specific indicators;
- Integrate the concepts behind Women, Peace, and Security into relevant national-level policies and strategies;

- Establish a mechanism for regular consultation with civil society representatives;
- Report annually to the National Security Council Deputies Committee on progress made toward achieving commitments, in order to inform a report to the President; and
- In 2015, conduct a comprehensive review of, and update to, the *National Action Plan*, which will be informed by consultation with international partners and relevant civil society organizations.

The *U.S. National Action Plan on Women, Peace, and Security* embodies and sets forth the United States' commitment to ensuring that women around the world play an equal role in promoting peace and achieving just and enduring security. Today and in the years to come, the Obama Administration dedicates itself to bringing the ideas behind the *National Action Plan* to life in pursuit of this essential goal.

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Secretary of State Hillary Rodham Clinton provided a preview and context for the National Action Plan in a speech she delivered on December 16, 2011 at the International Crisis Group's "In Pursuit of Peace" Award dinner. Secretary Clinton's speech is available at www.state.gov/secretary/rm/2011/12/178967.htm. Secretary Clinton's address began with a review of recent conflicts around the world, their impact on women, and women's lack of representation at the negotiations to end the conflicts. Many of these facts were also related, with footnotes identifying source information, in a State Department Fact Sheet, available at www.state.gov/r/pa/prs/ps/2011/12/179160.htm. Secretary Clinton then introduced the National Action Plan:

...In 2000, the international community took a major step by adopting UN Security Council Resolution 1325, recognizing that women are not just victims of conflict, they are agents of peace. So let us move beyond women being seen as spoils of war, to making sure for the first time that the world is looking at women as actors, not victims; as leaders, not followers.

The United States proudly supported 1325 and four follow-up resolutions. And we're pleased that the UN, NATO, and many other nations and institutions have made important strides in implementing these ideas.

But the promise remains largely unfulfilled because legal and structural barriers in too many places prevent women from participating. Cultural norms—real or imagined—often create physical threats that prevent them from attaining a formal role.

Well, we can't wait any longer.

So on Monday, the Obama Administration will launch a comprehensive new roadmap that will be accelerating and institutionalizing efforts across the U.S. Government to advance women's participation in making and keeping peace. In a speech on Monday at Georgetown University, I will explain how our troops, our diplomats, and our development experts will all work together to take our commitment to UN Security Council Resolution 1325 to the next level and make it a priority for American foreign policy.

Secretary Clinton's December 19 Georgetown speech, mentioned above and excerpted below, is available at www.state.gov/secretary/rm/2011/12/179173.htm.

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Today, I want to focus on one aspect of peacemaking that too often goes overlooked—the role of women in ending conflict and building lasting security. Some of you may have watched a week ago Saturday as three remarkable women—two from Liberia, one from Yemen—accepted the Nobel Peace Prize in Oslo. For years, many of us have tried to show the world that women are not just victims of war; they are agents of peace. And that was the wisdom behind the historic UN Security Council Resolution 1325, which was adopted a decade ago but whose promise remains largely unfulfilled. So it was deeply heartening to see those three women command the global spotlight and urge the international community to adopt an approach to making peace that includes women as full and equal partners.

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...[T]his is not just a woman's issue. It cannot be relegated to the margins of international affairs. It truly does cut to the heart of our national security and the security of people everywhere, because the sad fact is that the way the international community tries to build peace and security today just isn't getting the job done. Dozens of active conflicts are raging around the world, undermining regional and global stability, and ravaging entire populations. And more than half of all peace agreements fail within five years.

At the same time, women are too often excluded from both the negotiations that make peace and the institutions that maintain it. Now of course, some women wield weapons of war—that's true—and many more are victims of it. But too few are empowered to be instruments of peace and security. That is an unacceptable waste of talent and of opportunity for the rest of us as well. Across the Middle East and North Africa, nations are emerging from revolution and beginning the transition to democracy. And here too, women are being excluded and increasingly even targeted.

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That is why this morning, President Obama signed an Executive Order launching the first-ever U.S. National Action Plan on Women, Peace, and Security—a comprehensive roadmap for accelerating and institutionalizing efforts across the United States Government to advance women's participation in making and keeping peace. This plan builds on the President's national security strategy, and it was jointly developed by the Departments of State and Defense, USAID, and others with guidance from the White House. I also want to take a moment to recognize all our partners in civil society and the private sector who contributed, many of whom are here today. Without your on-the-ground experience, your passionate commitment, and your tireless effort, this plan would not exist, and we look forward to working just as closely together with you on implementing it.

Let me describe briefly how we will do that. The plan lays out five areas in which we will redouble our efforts. First, we will partner with women in vulnerable areas to prevent conflicts from breaking out in the first place. Women are bellwethers of society and, in fact,

sometimes they do play the role of canary in the coal mine. They know when communities are fraying and when citizens fear for their safety. Studies suggest that women's physical security and higher levels of gender equality correlate with security and peacefulness of entire countries. But political leaders too often overlook women's knowledge and experience until it's too late to stop violence from spiraling out of control.

So the United States will invest in early warning systems that incorporate gender analysis and monitor increases in violence and discrimination against women, which can be indicators of future conflict. We will also support grassroots women's organizations that work to stop violence and promote peace. And because women's economic empowerment leads to greater prosperity for their societies, we are putting women and girls at the center of our global efforts on food security, health, and entrepreneurship. We are working to lower barriers to their economic participation so more women in more places have the opportunity to own their land, start their businesses, access markets, steps that will ultimately lift up not only their families but entire economies and societies.

But what if, despite our best efforts, conflict does flare? A second focus of our National Action Plan is strengthening protection for women and girls during and after conflict. We will work with partners on the ground to crack down on rape as a tactic of war, hold perpetrators of violence accountable, and support survivors of sexual and gender-based violence.

Now one place to start is with the poorly trained soldiers and police who contribute to a culture of lawlessness, of violence and impunity, and often are fueled by discrimination against any woman outside their family. The United States will help build the capacity of foreign militaries, police forces, and justice systems to strengthen the rule of law and ensure that protecting civilians and stopping sexual and gender-based violence in particular is a shared priority. We are also working with the UN to recruit more female peacekeepers, to better train all peacekeepers to prevent, predict, and react to violence against civilians, and to address the political dynamics that drive sexual violence in conflict areas, because it's not just soldiers. Political leaders, local influentials set the tone for these abuses, and they must be held accountable as well.

The United States will support survivors of violence and help give them new tools to report crimes and access shelters, rehabilitation centers, legal support, and other services. We will also back advocacy organizations that reach out to men and boys, including religious and tribal leaders, to reduce sexual and gender-based violence in homes and communities. I worked some years ago with citizens in Senegal to end the practice of female circumcision, and we made the case on the basis that it was bad for the health of the future mothers of Senegal. And we were able to convince tribal and religious leaders to join our cause, and it's that kind of programmatic approach that we want to see more of.

Now ultimately, the best way to protect citizens is to end the conflict itself. So a third focus of the National Action Plan is expanding women's participation in peace processes and decision-making institutions before, during, and after conflicts. As I explained in my speech on Friday in New York, women bring critical perspectives and concerns to the peace table, and can help shape stronger and more durable agreements.

Take just one example. During 2006 peace negotiations in Darfur, male negotiators deadlocked over the control of a particular river until local women, who have the experience of fetching water and washing clothes, pointed out that the river had already dried up. ...

Excluding women means excluding the entire wealth of knowledge, experience, and talent we can offer. So the United States will use the full weight of our diplomacy to push

combatants and mediators to include women as equal partners in peace negotiations. We will work with civil society to help women and other leaders give voice to the voiceless. And we will also help countries affected by conflict design laws, policies, and practices that promote gender equality so that women can be partners in rebuilding their societies after the violence ends.

And that brings me to the fourth focus of our plan—ensuring that relief and recovery efforts address the distinct needs of women and girls who are the linchpins of families and communities and invaluable partners in stabilizing countries scarred by conflict. This is crucial because humanitarian crises caused by conflict can be just as dangerous as the fighting itself and can sow the seeds of future instability. Women are often among the most vulnerable in crises, yet they rarely receive a proportionate share of assistance or have the chance to help set post-conflict priorities. But with the right tools and support, women can lead recovery efforts and help get their communities back on their feet.

So the United States will encourage our international partners to include women and civil society organizations in the design and implementation of relief efforts and reconstruction planning. We will designate gender advisors for all USAID crisis response and recovery teams, and these advisors will highlight the specific concerns of women and girls to ensure that their perspectives are solicited and incorporated in the design and implementation of our programs. Refugees and other displaced people are highly vulnerable to exploitation and abuse, including sexual violence. So we will prioritize prevention and response to sexual violence, along with other lifesaving humanitarian assistance, and help build critical services such as food distribution, emergency education, cash-for-work programs, and health centers around women and their needs, including reproductive and maternal healthcare.

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Now, I realize that this National Action Plan lays out an ambitious agenda that will require a lot of concentrated and coordinated effort. So the fifth focus is institutionalizing this work across the United States Government. As part of this process, we will increase training for our troops, diplomats, and development experts on international human rights and humanitarian law, protecting civilians, preventing and responding to sexual and gender-based violence, and combating trafficking-in-persons. We will update policies and practices across our government, because our goal is to fundamentally change the way we do business.

The President's Executive Order directs key departments and agencies to develop comprehensive strategies to implement the National Action Plan within five months. ...

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And the National Action Plan will help us work with allies and partners here at home as well as abroad ... And in fact, more than 30 countries have already developed their own national action plans.

NATO is factoring women and their needs into key planning processes and training courses, stationing gender experts throughout operational headquarters, and deploying female engagement teams to Afghanistan, where the alliance is also training local women to serve in the security forces. In 2012, 10 percent of the Afghan military academy's class will be women, and by 2014 Afghanistan expects to field 5,000 women Afghan national police officers.

The United Nations is also making important progress, building on Resolution 1325. With strong U.S. support, the Security Council has already adopted four additional resolutions on women and security in just the past three years. And last month, the General Assembly's Third Committee adopted a new U.S.-led resolution to encourage greater political participation for women and an expanded role in making and keeping peace. And the establishment of a new organization within the UN system focused on gender called UN Women, headed by the former President of Chile Michele Bachelet is also making this an important focus. And the Secretary General has appointed a special representative for sexual violence in conflict—a step we strongly supported—and the Department of Peacekeeping Operations has steadily improved its guidance to peacekeeping in order to offer protection and leadership as key training components.

Now, why is all this happening, all these countries, the United Nations, NATO, and certainly us? Well, the reason is because we are convinced. We have enough anecdotal evidence and research that demonstrates women in peacekeeping is both the right thing to do and the smart thing, as well. It's right, because, after all, women are affected disproportionately by conflict; they deserve to participate in the decisions that shape their own lives. And it's the smart thing because we have seen again and again that women participating in these processes builds more durable peace.

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(2) United Nations actions on women, peace, and security

Several meetings and events at the UN in the fall of 2011 focused on the issue of women, peace, and security and the implementation of UN Security Council resolution 1325.

Secretary Clinton and other world leaders participated in an event on Women's Political Participation during the UNGA high-level session in September 2011. Secretary Clinton's remarks on "Women's Political Participation" on September 19, 2011 are available at <http://usun.state.gov/briefing/statements/2011/172755.htm>. A Joint Declaration on Advancing Women's Political Participation, signed by Secretary Clinton and other heads of state, foreign ministers, and government representatives at the September high-level session, is available at <http://usun.state.gov/briefing/statements/2011/172776.htm>.

On October 21, 2011, the United States introduced a resolution in the UN General Assembly on Women and Political Participation. Courtney Nemroff, U.S. Counselor for Economic and Social Affairs, introduced the resolution in a statement, excerpted below, and available at <http://usun.state.gov/briefing/statements/2011/176463.htm>. A cross-regional group of 130 other countries joined the United States in cosponsoring the UNGA resolution on Women and Political Participation. The UNGA adopted the resolution by consensus in December 2011. U.N. Doc. A/RES/66/130.

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The United States has the honor to introduce, on behalf of co-sponsors representing cross-regional support, draft resolution A/C.3/66/L.20 entitled Women and Political Participation. In

addition to the 37 co-sponsors indicated on the L document, the following countries have joined the list of co-sponsors:

Columbia, Cyprus, Honduras, Monaco, Palau, Republic of the Maldives, Republic of Moldova, Republic of Korea, Tunisia, Ukraine and the United Kingdom.

...This resolution deals with an area in which women's empowerment has become increasingly critical: women's full political participation. The need for proactive measures to ensure that women enjoy their right to participate on an equal basis with men in political processes and decision-making has become increasingly evident, especially during times of transition. The resolution I am introducing today applies broadly to women everywhere, but also draws attention in a few key paragraphs to such situations of countries in transitions.

Women's political participation produces significant benefits for their communities and can bolster the development, economic prosperity, and stability of their nations. Even so, across the globe, women's voices in political decision-making are still muted. Discriminatory laws and practices persist. Recently, after taking—sometimes great—risks to call for an end to repression and to advocate for democracy in a number of countries undergoing political transitions, women activists often now face exclusion from key political negotiations.

In light of these worldwide challenges, we have introduced a resolution to underline the need to ensure women's involvement in all aspects of political processes and decision-making. The resolution reaffirms and builds upon the pioneering UN General Assembly resolution 58/142 from 2003. The new resolution begins by acknowledging key international human rights instruments to underscore their applicability to the issue of women's political participation. It also recognizes the important contributions women have made in many countries toward achieving representative, transparent and accountable governments.

The new resolution stresses the importance of women's political participation in all contexts, including during times of peace, conflict, and all stages of political transition. The resolution expresses concern at the obstacles to women's political participation on an equal basis with men and notes the opportunity that situations of political transition create for addressing those obstacles. The resolution also reaffirms the important role of women in resolving conflicts and in peacebuilding, as stated in Security Council resolution 1325.

The resolution notes that, throughout the world, discrimination and poverty can marginalize women, and that the active, equal participation of women is essential to achieve sustainable development and democracy. It highlights the importance of education, training and skills development, so that women can actively contribute fully to society and the political process.

The operative section of the resolution calls on all states to eliminate discriminatory laws, regulations and practices; and to promote and protect the human rights of women with respect to engaging in political activities, taking part in public affairs, voting, holding office and formulating policy, associating freely, assembling peacefully, and expressing their views freely.

Turning from the general to the specific, the resolution calls upon states in situations of political transition to ensure women's participation on an equal basis with men with respect to a range of political decisions and activities.

An action-oriented paragraph is addressed to states and the UN system, urging specific actions that will help remove barriers and enhance women's political participation. States are encouraged to appoint women to all levels of government posts, to commit themselves to the goal of gender balance, to support public/private partnerships and to support the role of women in conflict resolution and peacebuilding. The resolution invites states to exchange best practices,

including the experiences of states that have gone through political transition in the recent past, and encourages the dissemination of the resolution to national, regional and local authorities as well as to political parties. The resolution invites the Working Group of the Human Rights Council on Discrimination in Law and Practice to continue to include a focus on political participation during times of political transition in its work. Finally, the resolution requests the Secretary-General to submit a report in two years on the status of political participation of women and the implementation of the resolution.

...This resolution speaks to women, and on behalf of women, in all parts of the world. We are thankful to the countries, from all regions, that have already shown their support for this effort by signing on as co-sponsors, and we welcome more co-sponsors. We will be holding informal consultations with all member states to reach a consensus text that we hope will have broad and vigorous support.

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The statement of Laurie Shestack Phipps, U.S. Adviser for Economic and Social Affairs, in the Third Committee during its discussion on the advancement of women on October 10, 2011 also addressed women's full political participation, especially during times of transition. Ms. Phipps' statement is available at <http://usun.state.gov/briefing/statements/2011/175202.htm>.

On October 28, 2011, the UN Security Council also issued a presidential statement on women and peace and security. U.N. Doc. S/PRST/2011/20.

b. Women's health

On September 14, 2011, Ambassador Donahoe delivered a statement at a Human Rights Council side event on applying a human rights-based approach to efforts to eliminate preventable maternal mortality and morbidity. Her statement, excerpted below, is available at <http://geneva.usmission.gov/2011/09/14/strengthening-health-systems-to-respond-to-needs-of-women-and-girls-must-be-a-political-priority/>.

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...The United States is proud to be one of the co-sponsors of this side event on eliminating preventable maternal mortality and morbidity. More than a decade after the UN established Millennium Development Goals concerning maternal and child health, global maternal and child mortality rates remain too high.

The means exist to save the lives of women and children. Strengthening health systems to better respond to the needs of women and girls must be a political priority.

The Human Rights Council is one of several UN bodies which has demonstrated the political will to address this issue. We thank Colombia and New Zealand for their leadership on initiating that resolution. In June 2009, HRC member states adopted by consensus a resolution on

“Preventable Maternal Mortality and Morbidity and Human Rights.” As a member of the HRC coalition supporting this initiative, let me mention some key examples of U.S. actions to combat maternal mortality domestically and globally. Within the U.S., new health care reform legislation expanded coverage and improved access to preventative care. Programs such as “Healthy Start” provide primary and preventative care to high-risk pregnant women.

On our international efforts, the United States has been working to provide technical leadership in this area of family planning. In FY 2010, a total of \$648.5 million was appropriated for U.S. assistance for family planning and reproductive health programs. The FY 2011 budget included \$615 million in funding for family planning and reproductive health, including \$40 million designated for the United Nations Population Fund (UNFPA).

Through the Global Health Initiative, the U.S. commits billions of dollars to improving global health, including efforts to reduce maternal and child mortality; prevent millions of unintended pregnancies; and thwart millions of new HIV infections. Through the Global Health Initiative, we provide a range of integrated, essential services for women and their children: skilled care during pregnancy, childbirth, and the post-partum period; family planning; prevention and treatment of HIV/AIDS, tuberculosis, and malaria; and child health interventions.

During the 2010 Commission on the Status of Women session, 15 years after the Beijing Women’s Conference, the U.S. was part of a cross-regional group of co-sponsors who introduced a resolution on “Eliminating maternal mortality and morbidity through the empowerment of women.” While progress has been made on the Beijing agenda, much more remains to be done.

The U.S. looks forward to continued partnerships to improve maternal and child health and contributing to progress in this area where we can.

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c. Women and nationality

On December 7, 2011, Secretary Clinton delivered remarks at the United Nations High Commissioner for Refugees ministerial on the 60th Anniversary of the Refugee Convention. In the excerpts below from her remarks, which are available at www.state.gov/secretary/rm/2011/12/178406.htm, Secretary Clinton discussed the issue of discrimination against women in the area of nationality laws. The statement of Laurie Shestack Phipps, U.S. Adviser for Economic and Social Affairs, in the Third Committee session on the advancement of women on October 10, 2011 also discusses women’s equal right to nationality, and is available at <http://usun.state.gov/briefing/statements/2011/175202.htm>.

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I want only briefly to mention one [United States pledge to protect and assist refugees] that is a particular priority for us and for me personally. It concerns one of the major causes of statelessness, which is discrimination against women.

At least 30 countries around the world prevent women from acquiring, retaining, or transmitting citizenship to their children or their foreign spouses. And in some cases, nationality

laws strip women of their citizenship if they marry someone from another country. Because of these discriminatory laws, women often can't register their marriages, the births of their children, or deaths in their families. So these laws perpetuate generations of stateless people, who are often unable to work legally or travel freely. They cannot vote, open a bank account, or own property, and therefore they often lack access to healthcare and other public services. And the cycle continues, because, without birth registration or citizenship documents, stateless children often cannot attend school.

In this compromised state—or no state, better put—women and children are vulnerable to abuse and exploitation, including gender-based violence, trafficking in persons, and arbitrary arrests and detention. That hurts not only the women and their immediate families, but the larger communities. When you have a population of people who are denied the opportunity to participate, they cannot contribute.

The United States has launched an initiative to build global awareness about these issues and support efforts to end or amend such discriminatory laws. We want to work to persuade governments—not only officials but members of parliament—to change nationality laws that carry this discrimination to ensure universal birth registration and establish procedures and systems to facilitate the acquisition of citizenship for stateless people. I encourage other member-states to join this effort, and I want to thank the High Commissioner, who has signaled his support. I encourage UNHCR to work with UN Women, UNICEF, UNDP, and other UN partners to achieve equal nationality rights for women.

There is so much more governments can do, and even ideas we haven't thought of, to help these and other vulnerable groups. So let's challenge ourselves in the 60th anniversary time to ask: What new strategies can we adopt to better serve the refugees who come to our borders or empower the stateless people within them? How can we expand and broaden the scope of our efforts?

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d. UN Commission on the Status of Women

The United States participated in the 55th Session of the UN Commission on the Status of Women ("CSW") in February 2011. In her remarks at the session, Melanne Verveer, U.S. Ambassador-at-large for Global Women's Issues, reviewed the "unfinished agenda" of the CSW, including: increasing girls' access to education; advancing women in science and technology, including women's access to technology, such as mobile technology, to further development; expanding the green economy for women; and expanding women's role in combating climate change. She also highlighted the Global Alliance for Clean Cookstoves. Ambassador Verveer's remarks are available at <http://usun.state.gov/briefing/statements/2011/157497.htm>.

3. Sexual Orientation

a. March Joint Statement at the Human Rights Council

In March 2011, the United States co-chaired and led the international lobbying effort on a joint statement on “Ending Acts of Violence and Related Human Rights Violations Based On Sexual Orientation and Gender Identity” at the Human Rights Council, which was signed by 85 countries—18 more than signed onto any previous UN statement on lesbian, gay, bisexual, and transgender (“LGBT”) issues. This was also the first such statement to call for the decriminalization of LGBT status. In remarks available at <http://usun.state.gov/briefing/statements/2011/158892.htm>, Ambassador Rice announced the statement:

As the United States continues our important work in the Human Rights Council this week, we are proud to recognize a historic statement, signed by a record 85 nations, reaffirming the rights of all people—regardless of who they are and whom they love. More nations than ever believe that violence based on sexual orientation and gender identity must end. The United States is proud to lend our strong support to this growing consensus and to work towards a world in which all gay, lesbian, bisexual and transgender individuals can live free from fear of persecution, discrimination, or assault.

We will continue to stand firm in the Human Rights Council on behalf of all those who are at risk of violence and discrimination. And we will continue to work to ensure that rights that are universally held are universally protected.

The White House also issued a statement, available at www.whitehouse.gov/the-press-office/2011/03/22/statement-press-secretary-ending-violence-based-sexual-orientation-and-g, hailing the March joint statement at the Human Rights Council:

Over the past months our diplomats have been engaged in frank, and at times difficult, conversations about the human rights of LGBT persons with governments from around world. This morning, at the United Nations Human Rights Council, some 85 countries joined the United States in reaffirming our joint commitment to end acts of violence and human rights abuses on the basis of sexual orientation and gender identity. The President is proud of the work we have done to build international consensus on this critical issue and is committed to continuing our determined efforts to advance the human rights of all people, regardless of their sexual orientation or gender identity.

b. June Human Rights Council Resolution

On June 17, 2011, the UN Human Rights Council adopted a resolution on “Human rights, sexual orientation and gender identity” by a vote of 23 states in favor to 19 states opposing with three abstentions. U.N. Doc. A/HRC/RES/17/L.9/Rev.1. The resolution expresses “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.” In paragraph 1, the resolution requests that the High Commissioner complete a study by December 2011

documenting discrimination and violence against individuals based on sexual orientation and gender identity around the world and the ways international human rights law can be used to end such violence and discrimination. Several United States Government officials made statements welcoming the resolution both at the time of adoption and subsequently during 2011.

President Obama made the following statement on the day the resolution was adopted:

Today for the first time in history, the United Nations adopted a resolution dedicated to advancing the basic human rights of lesbian, gay, bisexual, and transgender (LGBT) persons. This marks a significant milestone in the long struggle for equality and the beginning of a universal recognition that LGBT persons are endowed with the same inalienable rights and entitled to the same protections as all human beings. The United States stands proudly with those nations that are standing up to intolerance, discrimination, and homophobia. Advancing equality for LGBT persons should be the work of all peoples and all nations. LGBT persons are entitled to equal treatment, equal protection, and the dignity that comes with being full members of our diverse societies. As the United Nations begins to codify and enshrine the promise of equality for LGBT persons, the world becomes a safer, more respectful, and more humane place for all people.

Daily Comp. Pres. Docs., 2011 DCPD No. 00454.

The statement of Ambassador Donahoe in support of the resolution is available at <http://usun.state.gov/briefing/statements/2011/155277.htm>.

In addition, three State Department deputy assistant secretaries provided a special briefing on the day the resolution was adopted. The full text of the briefing is available at www.state.gov/p/io/rm/2011/166470.htm. Deputy Assistant Secretary Suzanne Nossel, Bureau of International Organization Affairs, explained the resolution's significance to the Administration:

This is really a paradigmatic example of using the UN system to advance one of President Obama's top policy priorities. We've been able to deliver on broad international support behind an agenda that we have set as a key goal for this Administration.

This resolution, I think, will be a lifeline to those struggling for their rights around the world who now know that they have the weight of the United Nations behind them, that they're not alone, that they can turn to the international system for protection. When they're abused, when they're subject to violence, they can reach out and the Human Rights Council and the high commissioner for human rights are there to support them.

At the same special briefing, Deputy Assistant Secretary Daniel Baer, Bureau of Democracy, Human Rights, and Labor, elaborated on the Administration's overall efforts in the area of human rights of LGBT persons:

. . . [W]ithin the context of the UN system, there has been a series of events leading up to today's resolution which was, as Suzanne indicated, led by South Africa, but Ambassador Donahoe's team here put together a side event here last September on LGBT human rights and violence against LGBT people.

There was a statement—well, actually in New York in December. We led an effort to reinsert sexual orientation and gender identity into a resolution at the UN, where it had been removed, about extrajudicial killings.* Then in March, there was this joint statement signed by 85 countries, which the U.S. team here did a great job of leading, and now today, the first ever resolution. And so I think this resolution comes at a time where the U.S. has ramped up our engagement on this issue across the board, and not only in the context of international organizations, but also at our embassies and posts around the world.

Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations also hailed the resolution in a statement on the day of its adoption, available at <http://usun.state.gov/briefing/statements/2011/166388.htm>. Secretary of State Clinton's statement on the resolution is available at www.state.gov/secretary/rm/2011/06/166383.htm.

c. U.S. initiatives to protect the human rights of LGBT persons

On December 6, 2011, Secretary Clinton focused her remarks in recognition of International Human Rights Day on efforts to protect the human rights of LGBT persons. Secretary Clinton highlighted accomplishments at the Human Rights Council in March and June. She also introduced new initiatives of the Obama administration to further promote protection of the human rights of LGBT persons. Her remarks, excerpted below, are available at www.state.gov/secretary/rm/2011/12/178368.htm.

* * * *

...Today, I want to talk about the work we have left to do to protect one group of people whose human rights are still denied in too many parts of the world today. In many ways, they are an invisible minority. They are arrested, beaten, terrorized, even executed. Many are treated with contempt and violence by their fellow citizens while authorities

* Editor's Note: For a discussion of the U.S.-led effort to reinsert language about killings based on sexual orientation into the resolution on extrajudicial killings, see *Digest 2010* at 239-40.

empowered to protect them look the other way or, too often, even join in the abuse. They are denied opportunities to work and learn, driven from their homes and countries, and forced to suppress or deny who they are to protect themselves from harm.

I am talking about gay, lesbian, bisexual, and transgender people, human beings born free and given bestowed equality and dignity, who have a right to claim that, which is now one of the remaining human rights challenges of our time. I speak about this subject knowing that my own country's record on human rights for gay people is far from perfect. Until 2003, it was still a crime in parts of our country. Many LGBT Americans have endured violence and harassment in their own lives, and for some, including many young people, bullying and exclusion are daily experiences. So we, like all nations, have more work to do to protect human rights at home.

Now, raising this issue, I know, is sensitive for many people and that the obstacles standing in the way of protecting the human rights of LGBT people rest on deeply held personal, political, cultural, and religious beliefs. So I come here before you with respect, understanding, and humility. Even though progress on this front is not easy, we cannot delay acting. So in that spirit, I want to talk about the difficult and important issues we must address together to reach a global consensus that recognizes the human rights of LGBT citizens everywhere.

The first issue goes to the heart of the matter. Some have suggested that gay rights and human rights are separate and distinct; but, in fact, they are one and the same. Now, of course, 60 years ago, the governments that drafted and passed the Universal Declaration of Human Rights were not thinking about how it applied to the LGBT community. They also weren't thinking about how it applied to indigenous people or children or people with disabilities or other marginalized groups. Yet in the past 60 years, we have come to recognize that members of these groups are entitled to the full measure of dignity and rights, because, like all people, they share a common humanity.

This recognition did not occur all at once. It evolved over time. And as it did, we understood that we were honoring rights that people always had, rather than creating new or special rights for them. Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.

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The second issue is a question of whether homosexuality arises from a particular part of the world. Some seem to believe it is a Western phenomenon, and therefore people outside the West have grounds to reject it. Well, in reality, gay people are born into and belong to every society in the world. They are all ages, all races, all faiths; they are doctors and teachers, farmers and bankers, soldiers and athletes; and whether we know it, or whether we acknowledge it, they are our family, our friends, and our neighbors.

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The third, and perhaps most challenging, issue arises when people cite religious or cultural values as a reason to violate or not to protect the human rights of LGBT citizens. This is not unlike the justification offered for violent practices towards women like honor killings, widow burning, or female genital mutilation. Some people still defend those practices as part of a cultural tradition. But violence toward women isn't cultural; it's criminal. Likewise with slavery,

what was once justified as sanctioned by God is now properly reviled as an unconscionable violation of human rights.

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The fourth issue is what history teaches us about how we make progress towards rights for all. Progress starts with honest discussion. Now, there are some who say and believe that all gay people are pedophiles, that homosexuality is a disease that can be caught or cured, or that gays recruit others to become gay. Well, these notions are simply not true. They are also unlikely to disappear if those who promote or accept them are dismissed out of hand rather than invited to share their fears and concerns. No one has ever abandoned a belief because he was forced to do so.

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But progress comes from changes in laws. In many places, including my own country, legal protections have preceded, not followed, broader recognition of rights. Laws have a teaching effect. Laws that discriminate validate other kinds of discrimination. Laws that require equal protections reinforce the moral imperative of equality. And practically speaking, it is often the case that laws must change before fears about change dissipate.

* * * *

A fifth and final question is how we do our part to bring the world to embrace human rights for all people including LGBT people. Yes, LGBT people must help lead this effort, as so many of you are. Their knowledge and experiences are invaluable and their courage inspirational. We know the names of brave LGBT activists who have literally given their lives for this cause, and there are many more whose names we will never know. But often those who are denied rights are least empowered to bring about the changes they seek. Acting alone, minorities can never achieve the majorities necessary for political change.

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... Right here in Geneva, the international community acted this year to strengthen a global consensus around the human rights of LGBT people. At the Human Rights Council in March, 85 countries from all regions supported a statement calling for an end to criminalization and violence against people because of their sexual orientation and gender identity.

At the following session of the Council in June, South Africa took the lead on a resolution about violence against LGBT people. The delegation from South Africa spoke eloquently about their own experience and struggle for human equality and its indivisibility. When the measure passed, it became the first-ever UN resolution recognizing the human rights of gay people worldwide. In the Organization of American States this year, the Inter-American Commission on Human Rights created a unit on the rights of LGBT people, a step toward what we hope will be the creation of a special rapporteur.

Now, we must go further and work here and in every region of the world to galvanize more support for the human rights of the LGBT community. To the leaders of those countries where people are jailed, beaten, or executed for being gay, I ask you to consider this: Leadership, by definition, means being out in front of your people when it is called for. It means standing up

for the dignity of all your citizens and persuading your people to do the same. It also means ensuring that all citizens are treated as equals under your laws, because let me be clear—I am not saying that gay people can't or don't commit crimes. They can and they do, just like straight people. And when they do, they should be held accountable, but it should never be a crime to be gay.

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The Obama Administration defends the human rights of LGBT people as part of our comprehensive human rights policy and as a priority of our foreign policy. In our embassies, our diplomats are raising concerns about specific cases and laws, and working with a range of partners to strengthen human rights protections for all. In Washington, we have created a task force at the State Department to support and coordinate this work. And in the coming months, we will provide every embassy with a toolkit to help improve their efforts. And we have created a program that offers emergency support to defenders of human rights for LGBT people.

This morning, back in Washington, President Obama put into place the first U.S. Government strategy dedicated to combating human rights abuses against LGBT persons abroad. Building on efforts already underway at the State Department and across the government, the President has directed all U.S. Government agencies engaged overseas to combat the criminalization of LGBT status and conduct, to enhance efforts to protect vulnerable LGBT refugees and asylum seekers, to ensure that our foreign assistance promotes the protection of LGBT rights, to enlist international organizations in the fight against discrimination, and to respond swiftly to abuses against LGBT persons.

I am also pleased to announce that we are launching a new Global Equality Fund that will support the work of civil society organizations working on these issues around the world. This fund will help them record facts so they can target their advocacy, learn how to use the law as a tool, manage their budgets, train their staffs, and forge partnerships with women's organizations and other human rights groups. We have committed more than \$3 million to start this fund, and we have hope that others will join us in supporting it.

The women and men who advocate for human rights for the LGBT community in hostile places, some of whom are here today with us, are brave and dedicated, and deserve all the help we can give them. We know the road ahead will not be easy. A great deal of work lies before us. But many of us have seen firsthand how quickly change can come. In our lifetimes, attitudes toward gay people in many places have been transformed. Many people, including myself, have experienced a deepening of our own convictions on this topic over the years, as we have devoted more thought to it, engaged in dialogues and debates, and established personal and professional relationships with people who are gay.

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As Secretary Clinton announced in her speech above, on December 6, 2011, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual and Transgender Persons. The Memorandum is set forth below and is available at www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1.

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The struggle to end discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons is a global challenge, and one that is central to the United States commitment to promoting human rights. I am deeply concerned by the violence and discrimination targeting LGBT persons around the world, whether it is passing laws that criminalize LGBT status, beating citizens simply for joining peaceful LGBT pride celebrations, or killing men, women, and children for their perceived sexual orientation. That is why I declared before heads of state gathered at the United Nations, “no country should deny people their rights because of who they love, which is why we must stand up for the rights of gays and lesbians everywhere.” Under my Administration, agencies engaged abroad have already begun taking action to promote the fundamental human rights of LGBT persons everywhere. Our deep commitment to advancing the human rights of all people is strengthened when we as the United States bring our tools to bear to vigorously advance this goal.

By this memorandum I am directing all agencies engaged abroad to ensure that U.S. diplomacy and foreign assistance promote and protect the human rights of LGBT persons. Specifically, I direct the following actions, consistent with applicable law:

Section 1. Combating Criminalization of LGBT Status or Conduct Abroad. Agencies engaged abroad are directed to strengthen existing efforts to effectively combat the criminalization by foreign governments of LGBT status or conduct and to expand efforts to combat discrimination, homophobia, and intolerance on the basis of LGBT status or conduct.

Sec. 2. Protecting Vulnerable LGBT Refugees and Asylum Seekers. Those LGBT persons who seek refuge from violence and persecution face daunting challenges. In order to improve protection for LGBT refugees and asylum seekers at all stages of displacement, the Departments of State and Homeland Security shall enhance their ongoing efforts to ensure that LGBT refugees and asylum seekers have equal access to protection and assistance, particularly in countries of first asylum. In addition, the Departments of State, Justice, and Homeland Security shall ensure appropriate training is in place so that relevant Federal Government personnel and key partners can effectively address the protection of LGBT refugees and asylum seekers, including by providing to them adequate assistance and ensuring that the Federal Government has the ability to identify and expedite resettlement of highly vulnerable persons with urgent protection needs.

Sec. 3. Foreign Assistance to Protect Human Rights and Advance Nondiscrimination. Agencies involved with foreign aid, assistance, and development shall enhance their ongoing efforts to ensure regular Federal Government engagement with governments, citizens, civil society, and the private sector in order to build respect for the human rights of LGBT persons.

Sec. 4. Swift and Meaningful U.S. Responses to Human Rights Abuses of LGBT Persons Abroad. The Department of State shall lead a standing group, with appropriate interagency representation, to help ensure the Federal Government's swift and meaningful response to serious incidents that threaten the human rights of LGBT persons abroad.

Sec. 5. Engaging International Organizations in the Fight Against LGBT Discrimination. Multilateral fora and international organizations are key vehicles to promote respect for the human rights of LGBT persons and to bring global attention to LGBT issues. Building on the State Department's leadership in this area, agencies engaged abroad should

strengthen the work they have begun and initiate additional efforts in these multilateral fora and organizations to: counter discrimination on the basis of LGBT status; broaden the number of countries willing to support and defend LGBT issues in the multilateral arena; strengthen the role of civil society advocates on behalf of LGBT issues within and through multilateral fora; and strengthen the policies and programming of multilateral institutions on LGBT issues.

Sec. 6. Reporting on Progress. All agencies engaged abroad shall prepare a report within 180 days of the date of this memorandum, and annually thereafter, on their progress toward advancing these initiatives. All such agencies shall submit their reports to the Department of State, which will compile a report on the Federal Government's progress in advancing these initiatives for transmittal to the President.

Sec. 7. Definitions. (a) For the purposes of this memorandum, agencies engaged abroad include the Departments of State, the Treasury, Defense, Justice, Agriculture, Commerce, Health and Human Services, and Homeland Security, the United States Agency for International Development (USAID), the Millennium Challenge Corporation, the Export Import Bank, the United States Trade Representative, and such other agencies as the President may designate.

(b) For the purposes of this memorandum, agencies involved with foreign aid, assistance, and development include the Departments of State, the Treasury, Defense, Justice, Health and Human Services, and Homeland Security, the USAID, the Millennium Challenge Corporation, the Export Import Bank, the United States Trade Representative, and such other agencies as the President may designate.

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Ambassador Susan Rice also released a statement on December 6, 2011 at the United Nations regarding the President's Memorandum on International Initiatives to Advance the Human Rights of LGBT Persons. Her statement appears below and is available at <http://usun.state.gov/briefing/statements/2011/178397.htm>.

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Today, President Obama [directed](#) all agencies to protect and promote the human rights of lesbian, gay, bisexual, and transgender persons abroad. At the United Nations, we have strongly supported efforts to codify and enshrine the promise of equality for the LGBT community, and the President's action adds yet more force to our urgent fight.

Since taking office in 2009, the Obama Administration has worked tirelessly within the UN system to advance the human rights of the world's LGBT persons. Early on, we signed the UN General Assembly's Statement on Sexual Orientation on Gender Identity. We joined the LGBT Core Groups in Geneva and New York. We won NGO consultative status for the International Gay and Lesbian Human Rights Commission. We championed the first UN resolution dedicated to advancing the basic and fundamental rights of LGBT persons. Last December, on Human Rights Day, we pledged to restore language including LGBT individuals in a resolution condemning extrajudicial killings. Within two weeks, we did so.

There is far more work to do before our LGBT friends, neighbors, parents and children live in a world free of discrimination. Through steadfast defense of our universal values, persistent engagement with international partners, and the full force of U.S. efforts under the law,

we will get there. I look forward to continuing our work and proudly carrying out the President's directive.

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Finally, the State Department issued a Fact Sheet, also on December 6, 2011, summarizing the Department's accomplishments promoting the human rights of LGBT people. The Fact Sheet is excerpted below and available in full at www.state.gov/r/pa/prs/ps/2011/12/178341.htm.

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Human rights are inalienable and belong to every person, no matter who that person is or whom that person loves. Since January 2009, Secretary Clinton has directed the Department to champion a comprehensive human rights agenda—one that includes the protection of the human rights of lesbian, gay, bisexual and transgender (LGBT) people. The Department uses its full range of diplomatic and development tools to press for the elimination of violence and discrimination against LGBT people worldwide, particularly those forced to flee their homes or countries.

The Department continues to counter efforts globally that discriminate against, criminalize, and penalize members of the LGBT community. The United States recognizes the unflagging efforts and courage of advocates and organizations fighting to promote equality and justice around the world, especially in countries where doing so puts their lives and their families at risk. At the same time, U.S. personnel policies must protect the human rights of all LGBT people, and consular and other tools must be used to provide equal access and equal rights to LGBT people.

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Under the Secretary's leadership, the Department's recent accomplishments include:

Bilateral and Regional Engagement:

- The Department has included the status of the human rights of LGBT people in each country included in the Department's annual Human Rights Report.
- The State Department works with U.S. embassies, civil society, and multilateral mechanisms, agencies, and forums to encourage countries to repeal or reform laws that criminalize LGBT status.

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Successfully Promoting LGBT Human Rights In Multilateral Forums

- At the UN Human Rights Council's (HRC) June 2011 session, the United States, South Africa, and Latin American and European Union countries led efforts to pass the first-ever UN resolution on the human rights of LGBT persons.
- At the HRC's March 2011 session, the United States co-chaired efforts of a core

- group of countries to issue a statement entitled “Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity.” The statement garnered the support of 85 countries, including 20 that had never before supported similar statements on the promotion of LGBT persons’ rights.
- In December 2010, the State Department led efforts at the UN General Assembly to reinsert language on sexual orientation into a resolution on extrajudicial, summary, and arbitrary executions, after the language’s removal in committee. The amendment was approved by a 93-55 margin.
 - The State Department is working to establish a special rapporteur on the protection of the human rights of LGBT people within the Inter-American Commission for Human Rights, after President Obama raised the importance of LGBT issues in a meeting with Brazilian President Dilma Rousseff earlier this year.
 - The United States also partnered with Brazil and others to secure adoption of a resolution on human rights, sexual orientation, and gender identity at the Organization of American States General Assembly in June.

Protecting LGBT Refugees, Asylum Seekers, and Migrants

- The Bureau of Population, Refugees, and Migration (PRM) is working to improve the security of LGBT refugees, asylum seekers, and migrants by implementing a comprehensive LGBT refugee protection strategy developed in coordination with the Department of Homeland Security, the Department of Health and Human Services, the UN High Commissioner for Refugees (UNHCR) and NGOs.

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Supporting LGBT Human Rights Defenders and Civil Society Groups

- To strengthen civil society groups, support advocates, and increase public dialogue, the Department of State is launching the Secretary’s Global Equality Fund, a public-private partnership initiative to advance the human rights of LGBT people. The State Department is contributing more than \$3 million to this important effort, and will seek partnership commitments from donor governments, corporations, and foundations.

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- The personal security of LGBT human rights defenders remains a top priority for the Department. The Fund will enhance the Department’s efforts to provide human rights defenders with legal representation, security, and, when necessary, relocation support. Since 2010, the Department has provided emergency assistance to over 40 LGBT advocates in 11 countries throughout Africa, Asia, and the Middle East.

Championing Human Rights through Public Diplomacy

- U.S. Embassies worldwide are declaring support for the human rights of LGBT people through innovative public diplomacy.

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Strengthening The Department’s Personnel and Consular Policies

- As one of her first acts in office, Secretary Clinton directed a review of whether the State Department could extend additional benefits to domestic partners. Following President Obama's 2009 memorandum on same-sex domestic partners' benefits, the State Department announced extension of the full range of legally available benefits and allowances to same-sex domestic partners of Foreign Service staff serving abroad.
- In June 2010, Secretary Clinton revised State Department equal employment opportunity policy. As the previous policy prohibited discrimination based on sexual orientation, the new policy explicitly added protection against discriminatory treatment of employees and job applicants based on gender identity.
- The State Department revised its Foreign Affairs Manual to allow same-sex couples to obtain passports under the names recognized by their state through their marriages or civil unions.
- In June 2010, the Bureau of Consular Affairs announced new procedures for changing the sex listed on a transgender American's passport, streamlining the process and simplifying requirements to ensure greater dignity and privacy for the applicant.

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4. Age

In 2011, the United States participated in two sessions of the United Nations Open-Ended Working Group on Ageing. The intervention of the United States at the April session is available at <http://usun.state.gov/briefing/statements/2011/161145.htm>. On August 4, 2011 Courtney Nemroff, U.S. Counselor for Economic and Social Affairs, delivered the U.S. closing statement at the August session of the Working Group. Ms. Nemroff's statement, excerpted below, is available in full at www.state.gov/s/l/c8183.htm.

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We come away from this week's session with the belief that a consensus has been reached in the Working Group on the need for further, concerted, multilateral action on these issues. Although some member states support a new treaty devoted to the rights of older persons and other new mechanisms, no consensus on these options has emerged from the April or August Open-Ended Working Group sessions. And many States have not yet joined the discussion to articulate their positions.

As we indicated on Monday, the United States believes that States should be informed, not only by the very important deliberations of the Working Group, but also by the results of the ten-year review of the Madrid International Plan of Action on Ageing, before taking a decision on whether a convention or other new mechanism is needed.

However, we would like to stress that that does not mean that nothing can or should be done on these issues between now and 2012. As panelists, delegations and other participants have noted, there are many actions that can be taken in the near term, without a new instrument or mechanism, to make a meaningful contribution to addressing the problems of the abuse of the rights of older persons and the challenges of the rapidly ageing populations in many countries. For example, along with the EU and others here, we support encouraging existing mandate holders to give the necessary attention to the rights of older persons within their mandates. We hope that the Working Group can focus on these near-term steps in a future session, while continuing its work to determine whether additional measures to strengthen the protection of the human rights of older persons are necessary in the longer term.

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5. Persons with Disabilities

In a July 25, 2011 proclamation, President Obama marked the 21st anniversary of the Americans with Disabilities Act (“ADA”). Daily Comp. Pres. Docs., 2011 DCPD No. 00527. The excerpts from the proclamation that follow advocate ratification and widespread implementation of the Convention on the Rights of Persons with Disabilities.

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Through the ADA, America was the first country in the world to comprehensively declare equality for citizens with disabilities. To continue promoting these principles, we have joined in signing the Convention on the Rights of Persons with Disabilities. At its core, this Convention promotes equality. It seeks to ensure that persons with disabilities enjoy the same rights and opportunities as all people, and are able to lead their lives as do other individuals.

Eventual ratification of this Convention would represent another important step in our forty-plus years of protecting disability rights. It would offer us a platform to encourage other countries to join and implement the Convention. Broad implementation would mean greater protections and benefits abroad for millions of Americans with disabilities, including our veterans, who travel, conduct business, study, reside, or retire overseas. In encouraging other countries to join and implement the Convention, we also could help level the playing field to the benefit of American companies, who already meet high standards under United States domestic law. Improved disabilities standards abroad would also afford American businesses increased opportunities to export innovative products and technologies, stimulating job creation at home.

Equal access, equal opportunity, and the freedom to make of our lives what we will are principles upon which our Nation was founded, and they continue to guide our efforts to perfect our Union. Together, we can ensure our country is not deprived of the full talents and contributions of the approximately 54 million Americans living with disabilities, and we will move forward with the work of providing pathways to opportunity to all of our people.

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The United States was an active participant at the Fourth Conference of States Parties to the Convention on the Rights of Persons with Disabilities (“Disabilities Convention”) in September 2011. On September 7, 2011, the United States participated in a round table discussion on Article 32 of the Convention and the role of international cooperation in supporting national implementation of the Convention. The U.S. statement is available at <http://usun.state.gov/briefing/statements/2011/172245.htm>. On September 8, 2011, U.S. State Department Special Advisor for International Disability Rights Judith Heumann addressed the Conference. Her remarks described U.S. government efforts to advance the rights of persons with disabilities, including President Obama’s July 25 proclamation, discussed above. Ms. Heumann’s remarks are available at <http://usun.state.gov/briefing/statements/2011/172249.htm>. Also on September 8, the United States provided a statement at the round table discussion on Article 27, “Realizing Work and Employment Opportunities.” That statement, describing U.S. domestic laws and programs to secure equal employment opportunities for persons with disabilities, is available at <http://usun.state.gov/briefing/statements/2011/172248.htm>.

Also on September 8, the United States delivered a statement at a round table discussion on Article 29 of the Convention, “Ensuring Effective and Full Participation in Political and Public Life.” That statement, excerpted below, is available in full at <http://usun.state.gov/briefing/statements/2011/172250.htm>.

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The United States is pleased to address Article 29’s critical focus on ensuring effective and full participation in political and public life. We are committed to ensuring that persons with disabilities have equal opportunities to participate in political and public affairs. We are working with members of civil society at home and internationally to empower individuals with disabilities to exercise their rights.

Multiple U.S. laws protect the rights to political participation for persons with disabilities. From the Voting Accessibility for the Elderly and Handicapped Act of 1984, through the National Voter Registration Act of 1993 (known as the “Motor Voter Act”), the Help America Vote Act (“HAVA”) of 2002, and the foundational antidiscrimination protections offered by Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973, the U.S. has adopted a comprehensive approach to making political participation accessible. The U.S. government provides technical assistance to and monitors local governments to ensure the full realization of political rights of persons with disabilities and takes strong enforcement actions when individuals are denied their rights. The federal government also works collaboratively with civil society to provide training and tools so that consumers and advocates can monitor local governmental actions and ensure that local governmental entities fully recognize the rights of persons with disabilities.

U.S. laws require the physical accessibility of all venues for civic participation, including polling places. The process of casting ballots also must be accessible. Our laws require that public entities afford all persons effective communication, so that persons with disabilities can fully participate in public affairs without barriers. U.S. laws further mandate that election

officials and other governmental workers should be trained in the electoral process and the rights of persons with disabilities so that they can assist individuals with all types of disabilities, including psycho-social, sensory, developmental, and physical, to participate in the electoral process. Since 1999, the Justice Department's Project Civic Access has signed agreements with 193 local governments throughout the country to ensure full access to civic life for over 4 million persons with disabilities. These agreements, which were pursued after problems with compliance were raised, recognize that non-discriminatory access to public programs and facilities is a civil right, and that individuals with disabilities must have the opportunity to participate in local government programs, services and activities on an equal basis with their neighbors.

To assist state and local entities in meeting accessibility requirements, the Justice Department has created a number of guides, such as an ADA Best Practices Tool Kit for State and Local Governments and a checklist for accessibility of voting places. All of these materials are available at the federal government's key disability rights website, <http://www.ADA.gov>.

The effectiveness of the U.S. approach is highlighted by the number of persons with disabilities throughout the country who hold local, state, and federal public offices. Also, candidates in national elections routinely develop platforms on key disability issues, a practice that demonstrates the effectiveness of disability rights advocates in communicating their messages in the public sphere. In recognition of the political significance of voters with disabilities, many campaigns appoint staff that specifically focus on outreach to this voting community.

In sum, the United States is deeply committed to ensuring that all individuals with disabilities have the opportunity for effective and full participation in all aspects of political and public life. This commitment also is reflected in our cooperation with other countries. The Department of State and USAID are working as implementing partners in providing technical assistance to countries seeking to make their elections inclusive of disabled voters. We are happy to engage in informal discussions with States Parties throughout this Conference to provide additional information about our laws and programs to promote full participation in political and public life. We also look forward to hearing about the efforts that other States Parties and Signatories are making to ensure access to political and civic life.

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C. CHILDREN

1. Optional Protocols to the Convention on the Rights of the Child

The Third Optional Protocol to the Convention on the Rights of the Child, establishing a complaint procedure, was negotiated and finalized in 2011. The United States co-sponsored a resolution at the United Nations General Assembly welcoming the conclusion of the Third Optional Protocol. The resolution was adopted by consensus on December 19, 2011. U.N. Doc. A/RES/66/138.

2. Children and Armed Conflict

a. Security Council

On July 12, 2011, the United Nations Security Council adopted a resolution on protecting children affected by armed conflict. U.N. Doc. S/RES/1998. The United States voted in favor of the resolution after working closely with other members of the Council to shape the text. Paragraph 3 of the resolution requested that the U.N. Secretary General identify in the annexes to his reports on children and armed conflict those parties to armed conflict that engage in recurrent attacks on schools or hospitals or persons related to schools or hospitals. Paragraph 21 of the resolution directed the Working Group on Children and Armed Conflict and the Special Representative for Children and Armed Conflict to consider within one year other options for increasing pressure on perpetrators of violations committed against children in situations of armed conflict. On July 12, Ambassador Rice addressed the Security Council during its debate on children and armed conflict and highlighted these provisions of the resolution. Her remarks are excerpted below and available in full at <http://usun.state.gov/briefing/statements/2011/168048.htm>. The United States continued to take an active role in the working group on children affected by armed conflict throughout 2011.

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We have increased the spotlight on grave abuses. We have built up our information-gathering capacity, including comprehensive reports by the Secretary General. We've listed serious perpetrators and frankly examined individual country situations. All these steps by the Working Group help keep such abuses squarely on the international agenda and bring them to the urgent attention of national authorities.

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This year's report also documents another appalling trend: increased attacks on schools and hospitals, particularly in Afghanistan, Cote d'Ivoire, DRC, Iraq, Burma, Pakistan, Yemen, and the Philippines. In Cote d'Ivoire alone, according to UNICEF, 224 schools were attacked during the post-election crisis, disrupting the education of some 65,000 children. The Secretary General's report documents such attacks, and with today's resolution, the Secretary General will have the mandate to "name and shame" those who perpetrate such attacks on a recurrent basis.

[O]verall we remain deeply concerned that persistent perpetrators continue their violations against children with impunity. Sixteen parties to armed conflict listed in the Annexes of the Secretary General's report have been listed for five years or more. This is plainly unacceptable. Thus, the United States has urged the inclusion in today's resolution of the Council's time-bound commitment to consider a broad range of options to increase pressure on persistent perpetrators. The Council's unanimous support for this commitment is an important step toward holding egregious violators accountable for their actions.

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b. *Child soldiers*

Consistent with the Child Soldiers Prevention Act of 2008 (“CSPA”), Title IV of Public Law 110-457, the State Department’s 2011 Trafficking in Persons report again listed the governments of Burma, Chad, Democratic Republic of the Congo, Somalia, Sudan, and Yemen as foreign governments that have violated the standards under the CSPA, i.e. governments of countries that have been “clearly identified” during the previous year as “having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers,” as defined in the CSPA. The full text of the TIP report is available at www.state.gov/q/tip/rls/tiprpt/2011/; discussion of designations under the CSPA is available at www.state.gov/q/tip/rls/tiprpt/2011/164224.htm#2. See *Digest 2010* at 244-46 for discussion of the CSPA designations in 2010. For additional discussion of the TIP report and related issues, see Chapter 3.B.3.

Absent further action by the President, the foreign governments designated in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment. In a memorandum for the Secretary of State dated October 4, 2011, President Obama determined that Chad has taken the necessary steps to allow for reinstatement of assistance, “that it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Yemen,” and that, with respect to the Democratic Republic of the Congo, it is in the national interest that the prohibition should be waived in part, “to allow for continued provision of International Military Education and Training and non-lethal Excess Defense Articles, and issuance of licenses for direct commercial sales of military equipment.” Daily Comp. Pres. Docs., 2011 DCPD No. 00719; 76 Fed. Reg. 65,927 (Oct. 25, 2011). The accompanying memorandum of justification provided an explanation for the President’s determination with respect to each country. The memorandum of justification is available at 76 Fed. Reg. 65,928-65,931 (Oct. 25, 2011).

3. Resolutions on Rights of the Child

a. *Human Rights Council*

At the 16th Session of the Human Rights Council, the United States co-sponsored a resolution on the rights of the child. On March 23, 2011, the United States delivered a general statement on the resolution, set forth below and available at <http://geneva.usmission.gov/2011/03/23/rights-chil/>. The resolution was adopted by consensus at the 16th Session. U.N. Doc. A/HRC/RES/16/12.

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...The United States is extremely pleased to co-sponsor the “Rights of the Child resolution: a holistic approach to the protection and promotion of the rights of children working and/or living in the streets” and thanks the co-sponsors for their transparency and flexibility during the negotiations. Consistent with the principles of the Convention on the Rights of the Child and its Optional Protocols and the objectives expressed in the resolution, the United States continues its domestic efforts to strengthen already existing protections for children and to pursue new and innovative ways of ensuring that the rights of children are realized.

The plight of homeless and runaway children at risk of exploitation is a global concern. The problem occurs internationally, from the city to the countryside, in affluent areas as well as in poor. Homeless children go to great lengths to stay out of sight and out of mind of the public and the authorities. They endure terrible circumstances as a result, and it is our job as concerned human beings and responsible governments to care, to take notice, and to give these children hope for a brighter future. We need to help these children find access to a caring adult, a secure home, an education, and a sustainable future.

Domestically, the United States Government is strongly committed to fighting homelessness, including for children. To contribute to this effort, President Obama included \$1.5 billion in the stimulus bill for the Homelessness Prevention and Rapid Re-Housing program in 2010.

In addition, through the USG’s Department of Health and Human Services, the Administration on Children, Youth and Families program awarded a total of \$48.6 million to 362 Basic Center Programs. The Basic Center Programs provided shelter to 44,929 youth up to age 18 or higher in some U.S. states. The youth received services including counseling, life skills training, and physical health care.

Internationally, the United States government provides significant resources to assist highly vulnerable children, including homeless and runaway children who are at risk of exploitation. There is an array of separate programs led and managed by over 20 different offices in seven USG agencies. These offices funded approximately 1,900 projects in 107 countries in fiscal year 2009. It is important to underscore that the United States considers prostitution of children to be a serious form of exploitation and that child prostitution should never be considered a legitimate form of work. This of course applies to homeless and runaway children who are at risk of exploitation.

Today we join consensus/co-sponsor on this resolution with the express understanding that it does not imply that States must become parties to instruments to which they are not a party nor that they must implement obligations under human rights instruments they are not a party to. By joining this resolution, we do not recognize any change in the current state of treaty or customary international law. Further we understand the resolution’s reaffirmation of prior documents to apply to those who affirmed them initially. Finally we understand that the term “right of protection” in the resolution refers to Article 3(2) of the Convention which obligates States Parties “to ensure the child such protection and care as is necessary for his or her well-being.”

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b. General Assembly

On December 19, 2011, the General Assembly adopted by consensus its annual resolution on the rights of the child. U.N. Doc. A/RES/66/141. U.S. Deputy Representative Sammis delivered a statement on November 22, 2011 before the Third Committee adopted the resolution. Mr. Sammis' statement is excerpted below and available in full at <http://usun.state.gov/briefing/statements/2011/177942.htm>.

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The United States is extremely pleased to co-sponsor the “Rights of the child” resolution today. Throughout the lengthy negotiations we welcomed the transparency, flexibility and support of the sponsors and other negotiating partners. This resolution highlights the important issue of protecting children with disabilities and to ensure that their interests and rights are safeguarded, and that they are equal participants in society. The United States is committed to advance the wellbeing of all children, including children with disabilities, and is committed to work with our partners in this room and around the world to advance the protection of these vulnerable children.

Our domestic efforts include the Individuals with Disabilities Act, or IDEA. This landmark legislation mandates programs and services, including special education services, that actively support states and localities in guaranteeing individuals with disabilities a free and appropriate public education. IDEA currently supports the education of over six million children and youth and 322,000 infants and toddlers with disabilities. Over more than three decades, IDEA has resulted in more young children with disabilities receiving high-quality early interventions that prevent or reduce future need for services. In addition, more children with disabilities are not only attending mainstream schools, but are also receiving access to the general education curriculum and learning a wide variety of academic skills.

The United States co-sponsors this resolution today with the express understanding that it does not imply that States must become parties to instruments to which they are not a party or implement obligations under human rights instruments to which they are not a party and, by co-sponsoring this resolution, we do not recognize any change in the current state of treaty or customary international law. Further we understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially. Moreover, we note that references to transfer of technology in UN resolutions should refer to technology transfers on mutually agreed terms. We hope to continue working with the co-sponsors and other delegations next year.

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4. Resolution on the Girl Child

On December 19, 2011, the General Assembly adopted by consensus a resolution on “the girl child.” U.N. Doc. A/RES/66/140. The United States co-sponsored the resolution when it was under consideration in the Third Committee. U.S. Deputy Representative Sammis

delivered the U.S. Statement on the resolution on November 22, 2011. Mr. Sammis' statement is excerpted below and available in full at

<http://usun.state.gov/briefing/statements/2011/177947.htm>

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The United States is pleased to co-sponsor this resolution and appreciates the efforts of the delegation of Angola to reach consensus and to address several of our concerns. The fact that the “Girl Child” resolution receives such broad support demonstrates that the international community recognizes that there is a need to focus on such issues as the discrimination against girls, health, education, poverty and early marriage.

The United States is committed to bettering the lives of women and girls, not just because it's the right thing to do, but because it is also the smart thing to do.

We are committed to focusing on empowering women and girls, not just as beneficiaries of development, but as agents of transformation. By considering women and girls in all of our policy initiatives, global health, food security, climate change, economic issues, human rights, and peace and security we can make those initiatives stronger and more successful.

We note that we co-sponsor this resolution today with the understanding that the resolutions' reaffirmation of prior documents applies to those who affirmed them initially. We look forward to continue working on the “Girl Child” resolution in 2013.

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D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, AND RELATED ISSUES

1. Overview

On March 24, 2011, Michael H. Posner, Assistant Secretary of State for Democracy, Human Rights, and Labor, delivered an address, entitled “The Four Freedoms Turn 70,” to the American Society of International Law in Washington, D.C. The address is excerpted below and available in full at

www.state.gov/j/drl/rls/rm/2011/159195.htm.

* * * *

[President Franklin D.] Roosevelt's premise was that our liberty rested on Four Freedoms: freedom of speech and expression, freedom to worship, freedom from fear, and freedom from want. He identified freedom of speech and freedom to worship as core civil and political rights, just as we do now. He defined “freedom from fear” as a reduction in arms, so as to diminish our collective destructive capabilities... And with the indelible phrase—“freedom from want”—Roosevelt linked the liberty of our people with

their basic economic and social wellbeing. This concept is being echoed today on the streets of Cairo, Tunis and other Arab cities.

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There are many ways to think about what should or should not count as a human right. Perhaps the simplest and most compelling is that human rights reflect what a person needs in order to live a meaningful and dignified existence. It is the core belief in the supreme value of human dignity that leads us, as Americans, to embrace the idea that people should not be tortured, discriminated against, deprived of the right to choose their government, silenced, or barred from observing the religion of their choosing. As President Obama has made clear, it is this same belief in human dignity that underlies our concern for the health, education, and wellbeing of our people.

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Today I want to re-examine those moral cornerstones, the Four Freedoms, as Roosevelt defined them, and ... I want to explain how we think about the economic and social rights that derive from Roosevelt's freedom from want.

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...Egyptians need the freedom from fear that the State Security police will knock on their door in the night or hack their Facebook pages. And they also need decent jobs for the nearly one-fifth of the population that is still living on less than \$2 a day.

As Roosevelt put it, "People who are hungry and out of a job are the stuff of which dictatorships are made."

President Obama echoed this theme in his Nobel Prize speech in December 2009, when he said, "Just peace includes not only civil and political rights—it must encompass economic security and opportunity. For true peace is not just freedom from fear, but freedom from want."

Although the freedom from want is not explicitly contained in the U.S. Constitution, concern about the economic wellbeing of the American populace is deeply embedded in our nation's history and culture.

After all, in the Preamble to the Constitution, the Framers aimed to "promote the general welfare." From our earliest days, state laws and constitutions sought to promote our people's economic security. And the American Dream is predicated on the belief that allowing individuals to flourish is the best way for our nation to flourish.

Nevertheless, the United States has had reservations about the international debate on economic, social and cultural rights, for reasons I will discuss in a moment.

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The United States has taken steps to provide for economic, social and cultural rights but we understand them in our own way and, at any given time, we meet them

according to our domestic laws—laws that emerge from a political system based on representative democracy, free speech and free assembly.

But since the founding of the UN, some Americans have worried that the international movement to recognize economic, social and cultural rights would obligate us to provide foreign assistance commitments that went beyond what was decided by the U.S. This has never been true. Human rights law doesn't create an obligation to any particular level of foreign assistance.

The U.S. is a leading contributor to global efforts to alleviate poverty and promote development—not because we have an *obligation* to but because it is in our interest. We do this through our bilateral aid programs, through our multilateral contributions, and through the American people—who annually contribute financially and through voluntary service to development and humanitarian activities around the world. ...

Some have also been concerned that using the language of human rights could create new domestic legal obligations that would be enforceable through the courts and tie the hands of Congress and the states. But we have been careful to ensure that any international agreements we endorse protect the prerogatives of the federal government, as well as those of our states and localities.

Under the U.S. federal system, states take the lead on many economic, social and cultural policies. For example, all 50 states are committed through their constitutions to providing education for all children. But our federal Constitution makes no mention of rights to education, health care, or social security.

Nevertheless, as my late friend and mentor Professor Louis Henkin wrote, once economic and social rights are granted by law, they cannot be taken away without due process. And these rights also fall under the general requirement that government act rationally and afford equal protection under the law.

Our government's commitment to provide for the basic social and economic needs of our people is clear, and it reflects the will of the American people.

The people ask us to care for the sick... and we do. ...

They ask us to provide shelter for the destitute... and we do. ...

They ask us to educate every child, including those with physical and learning disabilities... and we do. ...

Some of our suspicion of the international focus on economic, social and cultural rights springs from the misuse of these demands in earlier times. For decades, the Soviet states and the Non-Aligned Movement critiqued the United States for a perceived failure to embrace economic and social rights. They used the rhetoric of economic, social and cultural rights to distract from their human rights abuses. They claimed economic rights trumped political rights, while in fact failing to provide either. We have prioritized political and civil rights because governments that are transparent and respect free speech are stable, secure and sustainable—and do the most for their people.

It is time to move forward. The Obama administration takes a holistic approach to human rights, democracy and development. Human rights do not begin after breakfast. But without breakfast, few people have the energy to make full use of their rights. As Martin Luther King once noted, an integrated lunch counter doesn't help the person who can't afford to eat there.

Therefore, we will work constructively with like-minded delegations to adopt fair and well-reasoned resolutions at the UN that speak to the issues of economic, social and cultural rights and are consistent with our own laws and policies.

We will do this understanding that these goals must be achieved progressively, given the resources available to each government. But we will also stress that nothing justifies a government's indifference to its own people. And nothing justifies human oppression—not even spectacular economic growth.

When negotiating language on these resolutions and in our explanations of position, we will be guided by the following five considerations:

- First, economic, social and cultural rights addressed in UN resolutions should be expressly set forth, or reasonably derived from, the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights. While the United States is not a party to the Covenant, as a signatory, we are committed to not defeating the object and purpose of the treaty.
- Second, we will only endorse language that reaffirms the “progressive realization” of these rights and prohibits discrimination.
- Third, language about enforcement must be compatible with our domestic and constitutional framework.
- Fourth, we will highlight the U.S. policy of providing food, housing, medicine and other basic requirements to people in need.
- And fifth, we will emphasize the interdependence of all rights and recognize the need for accountability and transparency in their implementation, through the democratic participation of the people.

At the same time, the U.S. will not hesitate to reject resolutions that are disingenuous, at odds with our laws, or contravene our policy interests. Just because a resolution is titled “a right to food” doesn't mean it is really about the right to food. Resolutions are not labeling exercises. Rather, they are about substance.

Finally, we will push back against the fallacy that countries may substitute human rights they like for human rights they dislike, by granting *either* economic *or* political rights. To assert that a population is not “ready” for universal human rights is to misunderstand the inherent nature of these rights and the basic obligations of governments.

All Four Freedoms are key to the Obama administration approach to human rights, national security and sustainable global prosperity.

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Freedom from want in foreign policy today means a U.S. leadership role in a global food security initiative that aims to help subsistence farmers expand their production and developing countries to develop their markets. It also means being the world's leader in global health—providing treatment for those infected by HIV, and strengthening health systems in developing countries. It also includes our recent pledge of \$150 million in economic aid and democracy assistance to Egypt to help during this time of transition.

For our domestic policy today, freedom from want means this Administration will keep fighting to bring health care to more Americans, improve education to make our

country more competitive, and continue to provide unemployment benefits for those who need them. Despite our budget constraints, we will continue to invest in the future of the American people.

We will also continue to urge other countries to invest in a better future for their citizens. And we stand willing to assist by pursuing an approach to development that respects human rights, involves local stakeholders, promotes transparency and accountability, and builds the institutions that underpin sustainable democracy.

This is in our moral interest, our political interest and our strategic interest.

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2. Health Care

On June 1, 2011, at the UN Human Rights Council, the United States provided an intervention in response to a report issued by Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health Anand Grover. U.N. Doc. A/HRC/RES/17/25. The U.S. intervention is excerpted below and available in full at www.state.gov/s/l/c8183.htm.

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The United States and other countries have long agreed that all people everywhere have “the right to the enjoyment of the highest attainable standard of health.” ...

However, we do not agree with all of the human rights conclusions started in [Special Rapporteur] Grover’s report. This “right to health framework” is not well-defined, nor, even more importantly, is it necessarily beneficial to the advancement of the two purposes at stake here, human rights and public health. We would prefer to see the Special Rapporteur adopt a different approach to his mandate that advances these crucial purposes.

Any approach must use evidence-based objective evaluations. Evidence-based decision-making is critical for transparency and accountability. While human rights considerations are significant to health policy decisions, they must complement and not replace fact-based decision-making.

Although we disagree with many of the report’s conclusions, we appreciate the human rights analysis of treatment of people with HIV/AIDS.

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At the UN Human Rights Council on September 16, 2011, U.S. delegate Amy McGann delivered a statement, entitled “States Must Give Priority Attention to the Health Situation of Older Persons,” in a panel discussion on the right to health of older persons. That statement is excerpted below and available in full at <http://geneva.usmission.gov/2011/09/16/health-situation-of-older-persons/>.

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...While the right of everyone to the enjoyment of the highest attainable standard of physical and mental health applies not only to older persons, but to persons of all ages, in general older persons have increased health concerns. ...

The United States has strong laws, policies, and programs in place aimed towards establishing and protecting the rights, dignity, and independence of older persons. Four pieces of legislation—the Social Security Act, Medicare, Medicaid, and the Older Americans Act—form the foundation of economic, health, and social support for millions of seniors, individuals with disabilities, and their families. These programs have enabled millions of older Americans to live more secure, healthy, and meaningful lives.

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Our approach in the United States is consistent with the UN Principles for Older Persons and their goal of ensuring that states give priority attention to the situation of older persons. The UN Principles state that older persons should have access to health care, services, and appropriate institutional care, as well as the opportunity to enjoy their human rights.

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3. Food

a. Human Rights Council resolution

On March 25, 2011 at the 16th session of the Human Rights Council, the United States joined consensus on a resolution on the right to food. U.N. Doc. A/HRC/RES/16/27. U.S. delegate Patrick Riley delivered the explanation of the U.S. position on the resolution, which is excerpted below and available in full at <http://geneva.usmission.gov/2011/03/25/eop-right-to-food/>.

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The United States is pleased to be able to join consensus on this resolution on the right to food. Food is essential to the rights of all people to an adequate standard of living, as recognized in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, and is also an interdependent with the protection of other human rights. ...

Our government's commitment to provide for the basic social and economic needs of our people is clear, and it reflects the will of the American people. Public authorities throughout the United States take significant measures to support access to food and food production in the United States, including prohibiting discrimination in such programs, and these are protected by law. It is in this spirit we join consensus. Securing the right to food must be achieved progressively, given the resources available to each government, through transparent and

democratic processes. But we will also stress that nothing justifies a government's indifference to its own people. We stated our position on the right to food under international law last year, in response to resolution 13/4.**

We note that this resolution continues to include a large number of extraneous and inappropriate topics which do little to protect or contribute to the progressive realization of the right to food. ...

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While we join this resolution's welcoming the work of the Committee on Economic, Social and Cultural Rights, including its General Comment No. 12, we note significant disagreements with some portions of its work and that General Comment.

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b. General Assembly resolution

On December 19, 2011, the UN General Assembly adopted by consensus a resolution on the right to food. U.N. Doc. A/RES/66/158. On November 22, 2011, U.S. Deputy Representative Sammis explained the U.S. decision to join consensus on the resolution during the Third Committee's consideration of the text. That explanation of position is excerpted below and available in full at <http://usun.state.gov/briefing/statements/2011/177943.htm>.

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The United States is pleased to be able to join consensus on this resolution on the right to food.

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We support the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights, and joining consensus on this resolution does not recognize any change in the current state of conventional or customary international law regarding rights related to food. It is our objective to achieve a world where everyone has adequate access to food, but we do not treat the right to food as an enforceable obligation.

** Editor's note: See *Digest 2010* at 251-54 for a discussion of, and excerpts from, the U.S. explanation of position on resolution 13/4 on the right to food, adopted at the 13th session of the Human Rights Council.

We interpret this resolution's references to the right to food, with respect to States Parties to the aforementioned Covenant, in light of its Article 2(1), in which they undertake to take steps with a view to achieving progressively the full realization of economic, social, and cultural rights. We interpret this resolution's references to member States' obligations regarding the right to food as applicable to the extent they have assumed such obligations.

And while the United States has for the last decade been the world's largest food aid donor, we do not concur with any reading of this resolution that would suggest that states have particular extraterritorial obligations arising from a right to food. While we join this resolution's welcoming the work of the Committee on Economic, Social and Cultural Rights, including its General Comment No. 12, we note significant disagreements with some portions of its work and that General Comment. We interpret this resolution's reaffirmation of previous documents as applicable to the extent countries affirmed those documents in the first place.

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4. Water and Sanitation

a. Human Rights Council resolution

The United States joined consensus on the UN Human Rights Council resolution on "The Human Right to Safe Drinking Water" on September 18, 2011. U.N. Doc. A/HRC/RES/18/1. Ambassador Donahoe delivered an explanation of position, excerpted below and available at www.state.gov/s//c8183.htm.

* * * *

There can be no question of the increasing importance of water as an issue. ...

... [T]he United States remains deeply committed to addressing these global challenges. Safe drinking water and sanitation are essential to the rights of all people to an adequate standard of living, and to the enjoyment of the highest attainable standard of physical and mental health.

* * * *

Accordingly, the United States is pleased to join consensus today and read this resolution's references to the right to safe drinking water and sanitation in accordance with our July 27, 2011 statement in New York at the UNGA plenary meeting [Editor's note: see section D.4.c. below] and our September 30, 2010 statement here in Geneva on safe drinking water and sanitation [Editor's note: see *Digest 2010* at 250-51]. We appreciate the acknowledgement in this resolution that questions of international watercourse law and all transboundary water issues are outside the scope of this right. OP 5 and OP7 call upon states to take a number of actions—most of which are laudable. However, the drafting of some of these requests is overly broad, while others are overly specific. While we share the spirit and the objectives that appear to motivate these requests, including that all should enjoy access to safe drinking water and sanitation, in light of our concerns about some of their specific details and phrasings, we understand them to

be aspirational. Finally, we were pleased to see a reference to private actors' responsibility to respect human rights and we emphasize the obligation of state entities to protect human rights.

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b. Independent Expert's Mission to the United States

Then-UN Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation Catarina de Albuquerque (her position's title changed on March 24, 2011 to "Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation") conducted an official mission to the United States from February 22 to March 4, 2011. She presented her report of this mission to the UN Human Rights Council on August 2, 2011. U.N. Doc. A/HRC/18/33/Add.4. On September 15, 2011, U.S. delegate John Mariz delivered the U.S. statement at the interactive dialogue with the special rapporteur. That statement is available at <http://geneva.usmission.gov/2011/09/15/u-s-statement-at-the-hrc-dialogue-on-the-right-to-drinking-water-and-sanitation/> and is excerpted below.

* * * *

We underscore our commitment to providing safe and clean drinking water and proper sanitation to the American people. The United States is understandably proud of the tremendous accomplishments it has made in the past decades to provide its citizens with clean water at an affordable price. As the special rapporteur notes in her report, 92 percent of the population was served by water systems which met mandatory health standards. In addition, the U.S. far exceeds World Bank guidelines on affordability, as combined water and sewage bills average only 0.5 percent of household income.

While we recognize the challenges presented by the report, we have conveyed to the rapporteur our concerns that the report often focuses on anecdotes that do not fairly depict the state of drinking water and sanitation in the United States. Moreover, the report makes some factual errors and does not cite sources for some statistics.

The United States also acknowledges that some indigenous communities face significant challenges with respect to access to safe drinking water and sanitation. However, the United States is taking steps to address these challenges in conjunction with Tribal and State governments. For example, the United States has established a partnership across federal government agencies that brings together expertise and resources to address access issues, including funding of the construction of water and sanitation systems for indigenous communities. Furthermore, some of the issues raised regarding indigenous peoples are unrelated to their access to water and sanitation, and—to the extent they need to be addressed—would be more appropriately addressed by other special procedure mandate holders.

The report does not take into full account the federal system of the United States, where a number of the issues raised may be most feasibly handled at the state or local level rather than through federal action. As the report notes, water in the United States is governed by a complex amalgam of federal and state statutes which make it hard to make generalizations; however,

given the broad range of issues and situations in our country, it is impossible to have a one-size-fits-all solution.

As the report points out, there are considerable challenges that exist, such as in replacing aging infrastructure and providing drinking water to remote communities. We will give the report's recommendations due consideration.

We look forward to continuing to work with the special rapporteur to take concrete action to reduce the number of people without sustainable access to safe drinking water and basic sanitation.

* * * *

c. U.S remarks at the General Assembly

On July 27, 2011, U.S. Representative to ECOSOC Frederick D. Barton addressed the plenary meeting of the UN General Assembly on the issue of the human right to safe drinking water and sanitation. His remarks are excerpted below and available in full at <http://usun.state.gov/briefing/statements/2011/169199.htm>.

* * * *

The United States is deeply committed to finding solutions to our world's water challenges. ...

At the September 2010 session of the UN Human Rights Council in Geneva, the United States joined consensus on a resolution that affirms "that the human right to safe drinking water and sanitation is derived from [one], the right to an adequate standard of living and [two] inextricably related to the right to the highest attainable standard of physical and mental health." Both tenets are drawn from the Covenant on Economic, Social and Cultural Rights, and they call upon governments to take steps towards the progressive realization of this human right. In March at the Human Rights Council, the United States supported the renewal of the mandate of the independent expert on this issue.

In the context of the human right to safe drinking water and sanitation, we believe the following:

- First, governments should strive to progressively realize universal access to safe drinking water and sanitation, and should seek to expand access, especially for underserved populations. Governments should develop and implement national policies and strategies, where needed, and commit sufficient budgetary resources so that they will be able to advance this goal as quickly as possible.

- Second, governments have an obligation to ensure that access to safe drinking water and sanitation services is provided on a nondiscriminatory basis. Governments also have obligations to provide, or ensure access to, safe drinking water and sanitation to persons in their custody.

- Third, the right to safe drinking water and sanitation can reasonably be interpreted to include access to cooking water. It can also be reasonably understood to mean water in sufficient quantity and quality—although not necessarily potable quality—to meet basic needs regarding personal hygiene.

· Finally, in support of all of this, governments should work towards greater transparency and accountability in water and sanitation service provision and include the public in government decision making. Good governance is fundamental to the achievement of a right to safe drinking water and sanitation.

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5. Cultural Issues

a. Human Rights Council resolution

On June 17, 2011, the United States joined consensus on the Human Rights Council resolution “Promotion of the enjoyment of cultural rights of everyone and respect for cultural diversity.” U.N. Doc. A/HRC/RES/17/15. The United States’ explanation of position, delivered on June 17, 2011, is excerpted below and available at www.state.gov/s/l/c8183.htm.

* * * *

... [T]he United States continues to support the promotion of cultural diversity, pluralism, tolerance, cooperation and dialogue among people from all cultures. In this spirit, we are pleased to join consensus. Cultural diversity has played a critical role in our own country’s history, which shows that cultural diversity can strengthen human rights. Respect for our differences has contributed to the significant legal protections for members of minority groups.

Human rights are universal, and all governments are responsible for abiding by their obligations under international human rights law. We believe that respect for human rights also substantially enhances respect for diversity. We do have concerns, however, that the concept of cultural diversity, particularly when espoused in a human rights context, could be misused. Cultural diversity should neither be used to undermine or limit the scope of human rights, nor to justify or legitimize human rights abuses. We would like to reinforce that efforts to promote cultural diversity should not infringe on the enjoyment of human rights. Instead, cultural diversity and international human rights can be mutually reinforcing concepts that help us all achieve a better world.

Certain cultural rights are set forth in Article 27 of the UN Declaration on Human Rights, as well as in other human rights instruments. The relevant instruments state that economic, social and cultural rights are to be progressively realized. With regard to the paragraphs of this resolution that take note of the Independent Expert’s report and of the experts’ meeting, we disagree with the conclusions of that report and meeting insofar as they purport to recognize a new right to access and enjoy cultural heritage.

* * * *

b. General Assembly resolution

The United States voted against UN General Assembly resolution 66/154, Human Rights and Cultural Diversity. U.S. Deputy Representative Sammis delivered an explanation of vote to the Third Committee on November 22, 2011. That explanation, excerpted below, is available in full at <http://usun.state.gov/briefing/statements/2011/177940.htm>.

* * * *

The United States continues to support the promotion of cultural pluralism, tolerance, cooperation and dialogue among individuals from different cultures and civilizations. ...

Cultural diversity has played a critical role in our own country's history, which shows that cultural diversity can strengthen human rights. We are concerned, however, that the concept of "cultural diversity" as put forward in this resolution could be misused to legitimize human rights abuses. Human rights are universal. Respect for them substantially enhances the respect for diversity we all seek.

Efforts to promote cultural diversity should not infringe on the enjoyment of human rights, nor justify limitations on their scope. By raising the concept of cultural diversity to the level of an essential objective while failing to reflect such potential concerns about its misuse, this resolution misrepresents the relationship between cultural diversity and international human rights law.

A more balanced and accurate characterization of cultural diversity and its relationship with human rights law is presented in the UN Human Rights Council's resolution 17/15, "Promotion of the enjoyment of cultural rights of everyone and respect for cultural diversity," on which the United States joined consensus in June 2011. Furthermore, in this context we do not believe that UNESCO should take up initiatives aimed at promoting intercultural dialogue on human rights.

* * * *

c. Statement at Human Rights Council

On May 31, 2011, the United States participated in an interactive dialogue at the UN Human Rights Council with Special Rapporteur in the Field of Cultural Rights Farida Shaheed. The U.S. intervention, available at www.state.gov/s/l/c8183.htm, included the following statement:

The United States thanks Independent Expert on Cultural Rights Shaheed for her report, which explores a need for a human rights-based approach to cultural heritage. ... We do not agree with all of her statements about the relationship between human rights and cultural heritage. In particular, some statements of what governments should or must do, such as obtaining consent of concerned communities before acting to protect cultural heritage, seem sensible as general

principles or policies, but may have exceptions and are not necessarily obligations of human rights law.

6. Hazardous waste

The United States joined consensus on UN Human Rights Council resolution 18/11, “Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste,” on September 29, 2011. Ambassador Donahoe delivered an explanation of position on the same day, which is excerpted below and available in full at www.state.gov/s/l/c8183.htm.

* * * *

The United States recognizes that improper management and disposal of hazardous substances and wastes may have implications for the effective enjoyment of human rights, including civil, political, economic, social, and cultural rights. Accordingly, we join consensus on this resolution.

* * * *

We would note some concerns with the resolution, however. As an initial matter, we reiterate our general concern regarding the approach of placing environmental issues in the human rights context, particularly where, as here, venues other than this Council have the mandate and the technical expertise to address the environmental issue under discussion. As specific concerns, this resolution’s text could make more consistent its varied descriptions of possible implications for the effective enjoyment of human rights. Where the resolution notes concerns that may arise from “movements” of hazardous substances and wastes, we understand this to address, more specifically, uncontrolled and illegal movements.

We are also particularly concerned about one of the possible topics that the Special Rapporteur may report on, concerning the possibility of ambiguities in international instruments and gaps in effectiveness of international regulatory mechanisms. We understand this part of the mandate to be interpreted within the larger mandate of the Human Rights Council. In that respect, it would of course focus solely on human rights issues and, consistent with the preamble of the resolution, avoid overlap with the competence of expert, non-human rights international instruments and entities. We also understand that this mandate should not presume conclusions about such instruments and entities that are not necessarily warranted. Accordingly, we hope that the Special Rapporteur will take care to address possible human rights implications, rather than non-human rights issues involving how to manage and dispose of hazardous substances and wastes, and rather than interpreting environmental treaties that are beyond his authority or mandate.

Finally, we also ask that the Council consider carefully, in three years' time, whether the work of this Special Rapporteur, which at that point will have been ongoing for 20 years, will be complete at the end of the term that is being renewed today.

* * * *

7. Foreign Debt and Human Rights

On March 24, 2011, the United States voted against a Human Rights Council resolution extending the mandate of the independent expert on the effects of foreign debt and other related international obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights. The resolution was adopted by a vote of 29 in favor, 13 against, with 4 abstentions. U.N. Doc. A/HRC/RES/16/14. U.S. delegate Mark Cassayre delivered the explanation of the U.S. vote, excerpted below and available in full at <http://geneva.usmission.gov/2011/03/23/eov-foreign-debt/>.

* * * *

The United States has long recognized the potentially harmful effects that excessive debt burdens can have on developing countries, especially Heavily Indebted Poor Countries. As such, debt relief continues to be an essential part of the United States' foreign aid program...

However, we continue to believe that it is incorrect to treat the issue of foreign debt as a human rights problem to be addressed by this Council. Rules other than human rights law are most relevant to the contractual arrangements between States and lenders. There are other international fora which are much better equipped to deal with the questions of foreign debt and debt forgiveness, which are principally economic and technical in nature.

Unfortunately, continuing the mandate of the independent expert does not simply further the inappropriate treatment of this important issue as a human rights problem. It also diverts the focus and finances of this Council away from serious human rights issues that more urgently require our attention. Given the Human Rights Council's lack of technical competency on this subject, we regret that resources continue to be allocated of to this subject. The Council's limited time and resources should be deployed in other, more appropriate and effective ways.

We therefore must vote against this resolution.

* * * *

8. Development

a. U.S. Statement at the Human Rights Council

On September 14, 2011, at the 18th session of the Human Rights Council, Ambassador Donahoe delivered a statement at a panel discussion on the realization of the right to development. Ambassador Donahoe's statement is excerpted below and is available in full at <http://geneva.usmission.gov/2011/09/14/making-right-to-development-a-uniting-rather-than-divisive-issue-on-the-human-rights-agenda/>.

* * * *

The United States has some well-known concerns about the “right to development.” To move forward, we would like to consider ways we can work together constructively and make the right to development a uniting, rather than divisive, issue on the international human rights agenda.

Fostering development continues to be a cornerstone of U.S. international engagement, and we are the largest bilateral donor of overseas development assistance...

The United States is committed to development, but we continue to have concerns about the direction discussions on the right to development have taken over the years.

We are willing to work with the proponents of the right to development to expand the consensus on this topic in a way that will be mutually beneficial, if we take into account the following five points:

First, discussions and resolutions on the right to development should not include unrelated material on controversial topics, particularly topics that are being addressed elsewhere. For example, the most recent version of the annual UNGA Third Committee resolution on the right to development contains 41 operative paragraphs, as opposed to four operative paragraphs in the most recent Human Rights Council resolution on the same topic.

Second, we are not prepared to join consensus on the possibility of negotiating a binding international agreement on this topic. At the very least, we would need more of a shared consensus on the definition and nature of the right to development before considering whether such a time- and resource-intensive course of action would be necessary and beneficial.

Third, theoretical work is needed to define the right to development and in particular to explain how it is a human right, *i.e.*, a universal right that every individual possesses and may demand from his or her own government. This fundamental concern has not been adequately addressed.

Fourth, the recent efforts to come up with numeric or concrete indicators of development and its progress are interesting and warrant serious further consideration, though these efforts should leverage, not duplicate, the statistics of the World Bank, International Monetary Fund, regional UN statistical agencies, and the work done to monitor the Millennium Development Goals.

Finally, discussion of this topic needs to focus on aspects of development that relate to human rights, *i.e.*, those of individuals. Of course, that includes all human rights, civil and political as well as economic, social and cultural rights.

While we are strong supporters of international development, we have long expressed significant concerns about some understandings and interpretations of the right to development. We are willing to work to address those concerns in order to move forward on this important topic.

* * * *

b. Human Rights Council resolutions

On March 25, 2011, the Human Rights Council adopted a resolution on the right to development. U.N. Doc. A/HRC/RES/16/117. The United States abstained from the vote on

the resolution, as explained in the explanation of vote delivered by U.S. delegate Mark J. Cassayre. That March 25 explanation of vote is available at <http://geneva.usmission.gov/2011/03/25/eov-right-to-development/> and is not excerpted herein; it was similar in substance to the September 30, 2011 explanation of vote that is excerpted below.

On September 30, the United States abstained from the vote on UN Human Rights Council resolution 18/26 on the Right to Development. Ambassador Donahoe delivered the U.S. explanation of vote, excerpted below and available in full at www.state.gov/s/l/c8183.htm.

We have stated very clearly that we are not prepared to join consensus on the possibility of negotiating a binding international agreement based on concepts that the right to development currently envisages. . . . We are disappointed that the suggestions to add previously-accepted language from the Vienna Declaration, reaffirming [that] the human person is the central subject of development, were not given due consideration.

Nevertheless, we will engage constructively with the Open-Ended Working Group on the Right to Development, during its upcoming session on November 14-18. . . .

* * * *

The United States delegation was pleased to be able to participate in the panel discussion on “the way forward in the realization of the right to development.” And we are committed to finding ways we can work together constructively and make the right to development a uniting, rather than divisive, issue on the international human rights agenda. ...[W]e have decided we must call a vote and abstain on this resolution because it does not take into account one of our core concerns.

We have stated very clearly that we are not prepared to join consensus on the possibility of negotiating a binding international agreement based on concepts that the right to development currently envisages. ...

...[W]e are disappointed that the suggestions to add previously-accepted language from the Vienna Declaration, reaffirming [that] the human person is the central subject of development, were not given due consideration.

Nevertheless, we will engage constructively with the Open-Ended Working Group on the Right to Development, during its upcoming session on November 14-18. ...

* * * *

c. General Assembly resolutions

(1) World Summit for Social Development

The United States joined consensus on UN General Assembly resolution 66/125, “Implementation of the Outcome of the World Summit for Social Development and of the twenty-fourth special session of the General Assembly.” U.S. Deputy Representative Sammis delivered an explanation of position to the Third Committee on November 29, 2011. That explanation, excerpted below, is available in full at <http://usun.state.gov/briefing/statements/2011/177944.htm>.

* * * *

The United States is pleased to join consensus on this resolution. We share, and in fact strongly support, the stated goals of this resolution: poverty eradication, full and productive employment and decent work for all, and social inclusion...

Furthermore, we strongly endorse the resolution’s highlighting of the need to promote respect for all human rights and fundamental freedoms in the context of development. The interdependence of human rights is significant in that context—it is imperative that governments respect people’s civil and political rights while achieving the progressive realization of economic, social and cultural rights. Governments need to follow democratic, transparent and accountable processes while doing so.

We also support the attention given in the resolution to the rights of indigenous peoples, which is consistent with U.S. support for the United Nations Declaration on the Rights of Indigenous Peoples, as explained in the Announcement document that accompanied President Obama’s statement of support.

That said, we must reiterate many of the same concerns that we have voiced about previous versions of this resolution. Once again, we regret that the resolution does not strike a better balance in its analysis of the relative impact of external and internal factors on social development, and mischaracterizes the current state of the financial markets and food security issues.

The international community has long recognized the principle that the primary responsibility for social and economic development rests with national governments. External economic factors such as energy price fluctuations or global economic trends can certainly affect countries’ development, sometimes positively, sometimes negatively. But it matters more whether a national government’s domestic policies respond to the aspirations of ordinary citizens, provide them opportunities, remove obstacles to broad-based economic growth, and address their needs... Thus, [this resolution] offers the wrong prescription for economic recovery.

* * * *

(2) Right to Development

On December 19, 2011, the UN General Assembly adopted a resolution on the right to development by a vote of 154 in favor, 6 against, with 29 abstaining. U.N. Doc. A/RES/66/155. The United States voted against the resolution for the reasons explained in its explanation of vote, delivered by U.S. Deputy Representative Sammis. The explanation of vote, which is similar in substance to the U.S. explanation of vote on Human Rights Council resolution 18/26 (excerpted above) is available at <http://usun.state.gov/briefing/statements/2011/177950.htm>.

E. INDIGENOUS ISSUES

1. Free, Prior and Informed Consent

On May 12, 2011, U.S. Representative to the International Finance Corporation (“IFC”) Ian Solomon delivered a statement on the IFC’s updated Policy and Performance Standards on Environmental and Social Sustainability. The statement is available at www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20policy%20review%20-%20final%20policy%20May%202012%202011%20-%20US%20position%20to%20post.pdf. Among other topics, Mr. Solomon addressed the concept of “free, prior and informed consent” by indigenous peoples. Mr. Solomon stated:

The United States supports improved participation by and protection of indigenous peoples. With respect to the concept of Free, Prior and Informed Consent (FPIC), as the United States explained at the time it announced its support for the UN Declaration on the Rights of Indigenous Peoples, the United States understands the concept of “free, prior and informed consent” or “FPIC” to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken. In the context of the Sustainability Policy and Performance Standards, the IFC has proposed a higher threshold for some projects. The United States supports additional protections for indigenous peoples in the context of certain projects with special circumstances. However, the United States does not believe there is an international consensus in favor of a definition of FPIC that requires the agreement of indigenous peoples.

2. U.N. Declaration on the Rights of Indigenous Peoples

On a number of occasions in 2011, the United States reaffirmed its support for the UN Declaration on the Rights of Indigenous Peoples (“Declaration”), first announced by President Obama in December 2010. See *2010 Digest* at 262-84. On June 9, 2011, the U.S.

Senate Committee on Indian Affairs held hearings on the Declaration. The State Department's written testimony included the following explanation on the status of the Declaration:

... the UN Declaration was adopted by a vote of the UN General Assembly in 2007. There will not be another vote on the Declaration. Therefore, countries that have changed their position on the Declaration since 2007 have done so via public announcements of their new positions. President Obama's announcement on December 16, 2010, and the accompanying Announcement document ... are the official U.S. statement of support for the Declaration. No further steps are required to indicate that the U.S. supports the Declaration.

The State Department's written testimony is available at www.state.gov/s/l/c8183.htm. Donald Laverdure, Principal Deputy Assistant Secretary for Indian Affairs at the U.S. Department of the Interior testified at the Senate Committee hearing on the U.N. Declaration. His testimony is available at www.indian.senate.gov/hearings/upload/Donald-Laverdure-testimony.pdf.

3. U.S. Statement at the Inter-American Commission on Human Rights

On October 25, 2011, Deputy Assistant Secretary for Indian Affairs at the U.S. Department of the Interior Jodi Gillette, spoke at a hearing at the Inter-American Commission on Human Rights on the topic of violence against Native women in the United States. Deputy Assistant Secretary Gillette's statement is excerpted below and also available at www.state.gov/s/l/c8183.htm.

* * * *

As the Deputy Assistant Secretary for Indian Affairs at the Department of the Interior, I am pleased to share the implementation strategies we've recently put into place, which are designed to protect and safeguard Native women from violent crime. In recognizing the severity of the problem, the Department of the Interior has placed a high priority on combating violence against women in tribal communities. While the United States has far to go in this arena, our Department has embarked upon several efforts to address the issue.

The Department fully supported the Tribal Law and Order Act, which was passed by Congress and signed into law by President Obama on July 29, 2010. In the 15 months since the Act became law, the Department has made significant strides in implementing the Act; most notable are the efforts to address some of the jurisdictional concerns, which have undermined efforts to ensure the safety of Native women in tribal communities. While the Tribal Law and

Order Act addressed some of the restrictions facing tribal governments in protecting Native women, we recognize that other barriers must be addressed. In that regard, the Department of the Interior unequivocally echoes the Department of Justice's support of the reauthorization of the Violence Against Women Act and the proposed amendments ...

Our goal is to move towards a comprehensive system designed to eliminate this devastating problem. We have taken important steps to create programs, policies, protocols, and especially trainings which are intended to bring about improved responses to domestic violence. The Bureau of Indian Affairs (BIA) is focusing on the following three areas of trainings ... 1) BIA Law Enforcement; 2) Victim Witness Advocacy Program and 3) Tribal Courts.

* * * *

In the areas of agency collaboration and tribal consultation, pursuant to the Tribal Law and Order Act, the Department of the Interior has entered into a multi-agency agreement to address Alcohol and Substance Abuse and Prevention in Indian Country. ... As each of our initiatives has benefited from meaningful engagement with tribes, we will continue to work with tribes through formal consultations and extensive planning sessions.

In conclusion, the Department is strongly committed to improving safety in Indian Country. We are also morally obligated to address this issue, because for too long, Native women have been disproportionately victimized by domestic violence. We appreciate the Commission's focus on the safety of Native women and take courage with the strong leadership by our President on this issue. ... It is up to all of us to act quickly and decisively because Native women deserve to be safe in their respective communities. Thank you again for the opportunity to address this Commission.

* * * *

F. PROTECTION OF MIGRANTS

On November 15, 2011, the United States joined consensus when the Third Committee adopted a resolution on the protection of migrants. After the Committee adopted the resolution, a U.S. delegation member delivered a statement that explained the U.S. position on the resolution, including U.S. concerns about it. The statement reiterated some of the points the U.S. delegation made during the Committee's consultations on the draft resolution and many of the points the United States had made in previous years concerning the annual resolutions on the protection of migrants. The statement is available at <http://usun.state.gov/briefing/statements/2011/178680.htm>. See *Digest 2008* at 338-39; *Digest 2009* at 242; *Digest 2010* at 284. The General Assembly adopted the resolution without a vote on December 19, 2011. U.N. Doc. A/RES/66/172.

G. CLIMATE CHANGE

For discussion of issues relating to climate change generally, see Chapter 13.A.1.

On March 24, 2011, at its 16th session, the Human Rights Council adopted by consensus a resolution on human rights and the environment. U.N. Doc. A/HRC/RES/16/11.

The United States provided an explanation of its position on the resolution, set forth below and available at www.state.gov/s//c8183.htm.

* * * *

The United States believes that protection of the environment and its contribution to sustainable development, human well-being, and the enjoyment of human rights are vitally important. In this spirit, we join consensus on this resolution in the expectation that the Office of the High Commissioner for Human Rights will prepare a report that will contribute to our understanding of the facts relating to human rights and the environment. However, we have concerns regarding the general approach of placing environmental concerns in the human rights context. We also have significant concerns regarding the appropriate mandates for UN fora, as well as on specific language in this resolution.

We remain uncomfortable with the proliferation of resolutions and decisions addressing environmental issues across the UN system, particularly in fora such as this Council, which has neither the mandate nor the expertise to address environmental issues. In discussions on international environmental governance and the institutional framework for sustainable development in other fora, such as the UN Environment Program and the preparatory meetings of Rio+20, there is consensus on the need to restrict discussion on environmental issues to fewer UN organizations and multilateral environmental agreements. This resolution counters those efforts and undermines attempts to streamline the UN system and improve its efficiency...

The United States supports the principles of the Rio Declaration on Environment and Development, as agreed in 1992. While this resolution quotes only from Principle 7 of the Rio Declaration, we believe that every paragraph in this declaration is an important, carefully negotiated part of a larger whole. Language taken out of context from the larger text, therefore, may misrepresent the intention of the original declaration and risk undermining the approach of sustainable development, which strives to integrate all aspects of development in a mutually reinforcing way. We note that other provisions of the Rio Declaration—particularly Principles 10, 20, 21, and 22 relating to public participation, access to information and justice, and participation of women, youth, and indigenous people—are of more relevance to the requested report than Principle 7.

The United States understands and accepts that Rio Principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities. The United States does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries. Moreover, by joining consensus here, we are not changing our position on Rio Principle 3. As we noted at the Rio Conference, we understand the thrust of this citation to be that economic development goals and objectives must be pursued in such a way that the development and environmental needs of present and future generations are taken into account.

* * * *

On September 30, 2011, at its 18th session, the Human Rights Council adopted by consensus a resolution on human rights and climate change. U.N. Doc. A/HRC/RES/18/22. The United States provided an explanation of its position on the resolution, set forth below and available at www.state.gov/s/l/c8183.htm.

* * * *

The United States recognizes that all over the world people face serious risks because of climate change. No nation can escape the impacts of climate change—the security and stability of all nations and their people are at risk, especially the most vulnerable. As noted in Resolution 10/4, the effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights. And, as emphasized by the Conference of the Parties to United Nations Framework Convention on Climate Change (UNFCCC), countries should, in all climate change related actions, fully respect human rights. We remain firm in our conviction that discussion of climate change in the Human Rights Council must focus on ensuring that responses to climate change respect human rights. On that basis, we are very pleased to join consensus on this resolution.

We would like to note our concern about the resolution’s selective quoting from the UNFCCC, to which the United States is a party. We understand the references to be acknowledgements by the Council that the FCCC contains the stated provisions, rather than endorsements by the Council itself of the content of such provisions. We also view the quotations from that Convention as a subset of relevant UNFCCC provisions, and it goes without saying that the effects of these quotations from the UNFCC and the concepts they describe are limited to the context of that carefully negotiated Convention.

While we acknowledge the desire for a seminar on impacts of climate change on the enjoyment of human rights, we believe the seminar should not serve as an alternate negotiating forum to produce recommendations and specific text for the UNFCCC.

Fundamentally, we see a climate change-related role of this Council related to ensuring that countries respect their human rights obligations when they react to climate change. While, as the resolution reiterates, climate change is a global problem requiring a global solution, such a global solution is an issue for environmental bodies.

We interpret this resolution’s reaffirmation of human rights instruments in the first preambular paragraph as applicable to the extent countries affirmed those instruments in the first place.

Regarding the preambular section’s list of rights for the enjoyment of which climate change related impacts may have implications, we interpret the terms used to name economic, social and cultural rights as shorthand references to the more accurate and widely accepted terms, and we maintain our previously-stated positions on those rights. With respect to the same section, the phrase from the two Covenants should be interpreted in light of their context in the relevant covenants.

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H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

On December 19, 2011, the General Assembly adopted a resolution on torture and other cruel, inhuman or degrading treatment or punishment that included a paragraph proposed by the United States that expressed concern “with all acts which can amount to torture and other cruel, inhuman or degrading treatment or punishment committed against persons exercising their rights of peaceful assembly and freedom of expression in all regions of the world.” U.N. Doc. A/RES/66/150.

I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Death Penalty

On September 28, 2011, the Human Rights Council at its 18th session adopted by consensus a decision requesting ongoing reporting by the Secretary General on the question of the death penalty. U.N. Doc. A/HRC/DEC/18/117. The United States joined consensus on the decision, providing the following explanation:

International law does not prohibit capital punishment when imposed in accordance with a state’s international obligations. We thank the sponsors of this resolution for producing a text that is carefully drafted and consistent with international law and practice. We urge all governments that employ the death penalty to do so in conformity with their international human rights obligations.

U.S. explanation of position, available at <http://geneva.usmission.gov/2011/09/28/us-joins-consensus-on-resolution-on-reporting-by-the-un-secretary-general-on-the-death-penalty/>.

2. Extrajudicial, Summary or Arbitrary Executions

On June 16, 2011, the United States joined consensus on a Human Rights Council resolution on the mandate of the special rapporteur on extrajudicial, summary or arbitrary executions. U.N. Doc. A/HRC/RES/17/5. The United States provided a statement explaining its position on the resolution, excerpted below and available at www.state.gov/s/l/c8183.htm.

* * * *

The United States is pleased to join consensus on this text in condemning extrajudicial, summary or arbitrary executions against all persons, irrespective of their status. We strongly support the renewal of the mandate of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, and look forward to continuing dialogue with the mandate holder. We also strongly agree with and appreciate the cosponsors’ efforts to retain the reference to General Assembly

resolution 65/208, which contains language specifically condemning ESAs targeting vulnerable groups, including members of the LGBT community.

With regard to the legal underpinnings of this resolution, the United States notes that two mutually reinforcing bodies of law regulate unlawful killings of individuals by governments—international human rights law and international humanitarian law. While determining what international law rules apply to any particular government action during an armed conflict is highly fact-specific and made even more difficult by the changing nature of warfare, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict outside a nation’s territory are typically found in international humanitarian law. We are concerned that this point is not sufficiently clear in preambular paragraph 3.

Moreover, while we agree that all extrajudicial, summary or arbitrary executions are crimes, we would clarify that whether such executions constitute crimes under the Rome Statute of the International Criminal Court would depend on the circumstances in each case.

In conclusion, we underscore our firm belief that all States have clear international obligations to protect human rights and fundamental freedoms and should take effective action to combat all extrajudicial, summary or arbitrary killings and punish the perpetrators, and that these obligations are inextricably intertwined with the promotion of justice and the rule of law.

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In October 2011, the United States presented an intervention at the UN General Assembly Third Committee during an interactive dialogue with Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heyns. The U.S. intervention addressed criticisms the special rapporteur had made with respect to the operation against Osama bin Laden. The U.S. intervention is available at www.state.gov/s/l/c8183.htm.

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The United States has consistently and unequivocally condemned extrajudicial, summary, or arbitrary executions against all persons, irrespective of their status. We agree that all States have the obligation to protect human rights and fundamental freedoms and should take effective measures to combat extrajudicial killings and punish the perpetrators.

With respect to his most recent report, we wish to thank the SR for his thorough review of relevant legislation and practices in 101 countries and territories regarding the use of lethal force during law enforcement operations, in particular police actions during arrests. We found his identification and analysis of the five models of how countries deal with this issue informative. We will carefully review the principles and recommendations he has set out for further consideration.

We appreciate the report’s focus on domestic police powers and the acknowledgement of the fundamental distinctions between the two bodies of international law that may apply to the use of force by governments—international human rights law governing the use of lethal force in domestic law enforcement situations, and international humanitarian law governing the use of force in armed conflict. We continue to be concerned that the SR has chosen to comment on operations during armed conflict in a manner that obscures this clear distinction and contributes to confusion about the applicable rules.

We have a number of concerns regarding the SR's "case study" of the operation against Osama Bin Laden, and strongly reject any suggestion that his killing could be considered unlawful.

The U.S. Attorney General publicly explained earlier this year the legal basis for the operation against bin Laden. In particular, he noted that Bin Laden was the unquestioned leader of an enemy force who continued to plot attacks against the United States and, therefore, under the law of war, he was a legitimate target in our armed conflict with Al-Qaeda, and targeting him was justified as an act of national self-defense.

The manner in which the operation was conducted—taking great pains to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—comported with the law of war principles of distinction and proportionality.

We also strongly disagree with any suggestion that the operation against Bin Laden ruled out the acceptance of surrender. To the contrary, U.S. Forces were prepared to capture Bin Laden, if he surrendered. The laws of war require acceptance of a genuine surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible to accept the offer of surrender. Osama Bin Laden did not make such an attempt to surrender, and our forces were authorized to use force against him.

Finally, we fully acknowledge that the use of force against al Qaeda outside of hot battlefields, such as Afghanistan, is an issue on which there is some disagreement. Nevertheless, the United States does not view its authority to use force in such situations as unbounded, but instead subject to rules of international law that must be assessed on a case-by-case basis. ...

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J. PROMOTION OF TRUTH, JUSTICE, REPARATION

On September 29, 2011, the United States joined consensus on a resolution at the Human Rights Council establishing the first-ever special rapporteur "on the promotion of truth, justice, reparation and guarantees of non-recurrence." U.N. Doc. A/HRC/RES/18/7.

K. RULE OF LAW AND DEMOCRACY PROMOTION

1. Periodic and Genuine Elections

On November 18, 2011, the United States introduced a resolution in the Third Committee of the United Nations General Assembly on "Strengthening the Role of the United Nations in Enhancing Periodic and Genuine Elections and the Promotion of Democratization." The General Assembly adopted the resolution by consensus on December 19, 2011. U.N. Doc. A/RES/66/163. The statement of Kelly L. Razzouk, Human Rights Advisor and Third Committee Executive Officer for the U.S. Mission to the UN, appears below and is also available at www.state.gov/s/l/c8183.htm.

* * * *

It is my pleasure to bring before the Committee for Action the resolution entitled Strengthening the Role of the United Nations in Enhancing Periodic and Genuine Elections and the Promotion of Democratization, L. 43, Rev. 1.

Mr. Chair, we are very pleased this year to have over 80 cosponsors from across regions. We appreciate the constructive engagement of delegations on the text and the revised version that was tabled incorporates the views of delegations.

This year's text reaffirms that democracy is a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.

This year's text also includes new elements recognizing the importance of fair, periodic and genuine elections, including in new democracies and countries undergoing democratization in order to empower citizens to express their will and to promote successful transition to long-term sustainable democracies.

We appreciate the support of delegations for this text and we hope it will again be adopted by consensus as it has been in the past.

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2. Civil Society

a. Strategic Dialogue with Civil Society

On February 16, 2011 Secretary Clinton launched the Strategic Dialogue with Civil Society (the "Dialogue"), a Federal Advisory Committee within the U.S. Department of State. The launch event convened civil society representatives from more than 20 countries, senior officials from the U.S. Government, and leaders of several U.S.-based international NGOs in Washington, D.C. with thousands of civil society representatives participating virtually from U.S. Embassies around the world. Secretary Clinton's remarks at the launch are available at www.state.gov/secretary/rm/2011/02/156681.htm. After its launch, the Dialogue commenced its work through working groups and international sessions. Secretary Clinton's remarks at one session in Vilnius, Lithuania on June 30, 2011 are available at www.state.gov/secretary/rm/2011/06/167442.htm.

b. Human Rights Council

On September 15, 2011, Ambassador Donahoe delivered a statement for the United States during the 18th Session of the Human Rights Council on the critical foundation that civil society provides for promoting all human rights. Her statement, excerpted below, is available at <http://geneva.usmission.gov/2011/09/15/civil-society-promoting-all-human-rights/>.

* * * *

The United States is glad to have to the opportunity to affirm our unwavering commitment to the protection and promotion of human rights.

People around the world continue to demonstrate their desire for democratic government. We are inspired by the strength, courage, and innovation shown by peaceful demonstrators across the Middle East, and we support transitions to genuine democracies that reflect the aspirations of people across the region.

Against the backdrop of dramatic developments from Cairo to Tripoli to Damascus, we would like to emphasize in particular the essential role that civil society plays in the protection and promotion of human rights, and in the transition to genuine, vibrant democracies.

Civil society provides a critical foundation for holding governments accountable, ensuring good governance, and promoting all human rights, including economic, social and cultural rights. Citizens, activists, organizations, congregations, writers, journalists and reporters each play a vital role in encouraging governments to respect human rights. The mandate of this Council acknowledges the importance of these groups in creating and maintaining a healthy, vibrant society. Our commitment to civil society is renewed every time NGOs and national human rights institutions are given a voice in this chamber.

We call upon emerging democracies to recognize and publicly defend the vital role civil society plays in the transition to healthy and vibrant democracies. New governments must recognize this important role through their laws and their actions. To allow civil society to develop and flourish, governments must respect the right to freedom of expression and the right to freedom of peaceful assembly and association. In this light, we especially appreciated the timely and informative panel on the promotion and protection of human rights in the context of peaceful protests earlier this week.

Recent events in the Middle East and North Africa have demonstrated the importance of peaceful assembly, the time-honored right to come together in public to demonstrate demands, as a vital tool for civil society. This Council has acknowledged its importance in the appointment of a Special Rapporteur for Peaceful Assembly and Freedom of Association.

Likewise, civil society members must be able to express themselves in person, in the media, and over the internet. The drafters of the Universal Declaration of Human Rights, our bedrock document, showed great wisdom when they emphasized that freedom of expression applies equally “through any media and regardless of frontiers.”

States using the excuses of security, order, or stability as a justification to unduly restrict these rights do so at their peril. The permissible scope of restrictions under international human rights law is very narrow and should only be used when absolutely necessary. The former governments of Libya, Tunisia, and Egypt used these arguments to justify restricting basic rights and freedoms. But they had to answer to their people in the end. In Syria, we are again seeing what happens when a government tries to silence its people for too long.

Civil society must be able to make its voice heard in government and have a meaningful role in the conduct of public affairs. In many parts of the world we have seen civil society work effectively to demand transparency, protect the environment, battle corruption, promote charity and relief work, and defend the rights of the poor and disenfranchised elements of societies. We strongly support these efforts. As Secretary Clinton recently stated, “We have to protect civil society... They are the ones going to prison, they are the ones being beaten up, they are the ones on the front lines of democracy.”

We call upon this Council to continue its work with vigor and purpose, paying special attention to the important role that civil society plays in political transition. We have been heartened to see how this Council has responded to repression and widespread human rights violations in the Middle East. We urge the Council to continue to address human rights violations as they occur in other parts of the world. We look forward to working collaboratively to achieve these goals.

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3. Open Government Partnership

On July 12, 2011, the United States hosted the first high-level meeting of the Open Government Partnership (“OGP”) at the U.S. Department of State. In July, stakeholders assembled to prepare for the formal launch of the initiative in September. Secretary Clinton addressed the July meeting in remarks, available at www.state.gov/secretary/rm/2011/07/168049.htm, which included the following statement:

When a government invites its people to participate, when it is open as to how it makes decisions and allocates resources, when it administers justice equally and transparently, and when it takes a firm stance against corruption of all kinds, that government is, in the modern world, far more likely to succeed in designing and implementing effective policies and services. It is also more likely to harness the talents of its own people and to benefit from their ideas and experiences, and it is also more likely to succeed investing its resources where they are most likely to have the best return.

OGP is an initiative led by an International Steering Committee, co-chaired in its first year by the United States and Brazil. OGP comprises government and civil society representatives and aims to secure concrete commitments from governments to promote transparency, increase civic participation, fight corruption, and harness technology to make government open, effective and accountable. More information about OGP is available at www.state.gov/j/ogp/ and www.opengovpartnership.org/.

On September 20, 2011, OGP was formally launched in New York, with opening remarks by President Obama. Daily Comp. Pres. Docs., 2011 DCPD No. 00656. President Obama’s remarks are excerpted below. President Obama announced the Open Government Declaration, endorsed by the eight founding nations of the OGP: Brazil, Indonesia, Mexico, Norway, the Philippines, South Africa, the United Kingdom, and the United States. The Declaration is available at www.opengovpartnership.org/open-government-declaration.

* * * *

One year ago, at the UN General Assembly, I stated a simple truth—that the strongest foundation for human progress lies in open economies, open societies, and in open governments. And I challenged our countries to come back this year with specific commitments to promote transparency, to fight corruption, to energize civic engagement, and to leverage new technologies so we can strengthen the foundations of freedom in our own countries.

Today, we're joined by nations and organizations from around the world that are answering this challenge. In this Open Government Partnership, I'm pleased to be joined by leaders from the seven other founding nations of this initiative. I especially want to commend my friend, President Rousseff of Brazil, for her leadership in open government and for joining the United States as the first co-chairs of this effort.

We're joined by nearly 40 other nations who've also embraced this challenge, with the goal of joining this partnership next year. And we're joined by civil society organizations from around the world—groups that not only help hold governments accountable, but who partnered with us and who offer new ideas and help us to make better decisions. Put simply, our countries are stronger when we engage citizens beyond the halls of government. So I welcome our civil society representatives—not as spectators, but as equal partners in this initiative.

This, I believe, is how progress will be achieved in the 21st century—meeting global challenges through global cooperation, across all levels of society. And this is exactly the kind of partnership that we need now, as emerging democracies from Latin America to Africa to Asia are all showing how innovations in open government can help make countries more prosperous and more just; as new generations across the Middle East and North Africa assert the old truth that government exists for the benefit of their people; and as young people everywhere, from teeming cities to remote villages, are logging on, and texting, and tweeting and demanding government that is just as fast, just as smart, just as accountable.

This is the moment that we must meet. These are the expectations that we must fulfill. And now we see governments around the world meeting this challenge, including many represented here today. Countries from Mexico to Turkey to Liberia have passed laws guaranteeing citizens the right to information. From Chile to Kenya to the Philippines, civil society groups are giving citizens new tools to report corruption. From Tanzania to Indonesia—and as I saw firsthand during my visit to India—rural villages are organizing and making their voices heard, and getting the public services that they need. Governments from Brazil to South Africa are putting more information online, helping people hold public officials accountable for how they spend taxpayer dollars.

Here in the United States, we've worked to make government more open and responsive than ever before. We've been promoting greater disclosure of government information, empowering citizens with new ways to participate in their democracy. We are releasing more data in usable forms on health and safety and the environment, because information is power, and helping people make informed decisions and entrepreneurs turn data into new products, they create new jobs. We're also soliciting the best ideas from our people in how to make government work better. And around the world, we're standing up for freedom to access information, including a free and open Internet.

Today, the eight founding nations of our partnership are going even further—agreeing to an Open Government Declaration rooted in several core principles. We pledge to be more transparent at every level—because more information on government activity should be open, timely, and freely available to the people. We pledge to engage more of our citizens in decision-making—because it makes government more effective and responsive. We pledge to implement

the highest standards of integrity—because those in power must serve the people, not themselves. And we pledge to increase access to technology—because in this digital century, access to information is a right that is universal.

Next, to put these principles into practice, every country that seeks to join this partnership will work with civil society groups to develop an action plan of specific commitments. Today, the United States is releasing our plan, which we are posting on the White House website and at OpenGovPartnership.org.

Among our commitments, we’re launching a new online tool—called “We the People”—to allow Americans to directly petition the White House, and we’ll share that technology so any government in the world can enable its citizens to do the same. We’ve develop new tools—called “smart disclosures”—so that the data we make public can help people make health care choices, help small businesses innovate, and help scientists achieve new breakthroughs.

We’ll work to reform and expand protections for whistleblowers who expose government waste, fraud and abuse. And we’re continuing our leadership of the global effort against corruption, by building on legislation that now requires oil, gas, and mining companies to disclose the payments that foreign governments demand of them.

Today, I can announce that the United States will join the global initiative in which these industries, governments and civil society, all work together for greater transparency so that taxpayers receive every dollar they’re due from the extraction of natural resources.

So these are just some of the steps that we’re taking. And today is just the beginning of a partnership that will only grow—as Secretary Clinton leads our effort on behalf of the United States, as these nearly 40 nations develop their own commitments, as we share and learn from each other and build the next generation of tools to empower our citizens and serve them better.

So that’s the purpose of open government. And I believe that’s the essence of democracy. That’s the commitment to which we’re committing ourselves here today. And I thank all of you for joining us as we meet this challenge together.

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L. FREEDOM OF EXPRESSION

1. General

In March 2011, the United States co-sponsored a procedural resolution in the Human Rights Council extending the mandate of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression. The resolution was adopted by consensus on March 24, 2011. U.N. Doc. A/HRC/RES/16/4.

On July 5, 2011, the United States provided observations on the Human Rights Committee’s Draft General Comment 34 on Article 19 of the International Covenant on Civil and Political Rights. General Comment 34 was adopted in 2011. The United States Observations on the Draft are excerpted below.

* * * *

1. The United States Government appreciates the opportunity to respond to Draft General Comment 34 regarding Article 19 of the International Covenant on Civil and Political Rights.⁷ The United States takes extremely seriously its obligations under the Covenant and under other human rights treaties to which it is Party, including its obligations related to Article 19. Given the importance the United States places on the freedom of opinion and expression, it has a strong interest in the Committee's Draft General Comment. Much of the Committee's guidance is useful in terms of its views and recommendations on how to best implement Article 19, but the United States would like to focus its observations on a few key areas of the Draft General Comment that either would benefit from improvement or that the United States considers to be problematic. These include: the application of Article 19(3), the relationship between Articles 19 and 20, blasphemy laws, access to information, as well as observations on a few other paragraphs.

2. The United States strongly agrees as the Committee stated in paragraph 2 of its draft General Comment that "[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person" and that they "constitute the foundation stone for every free and democratic society." The United States maintains robust protections for freedom of expression, as provided for in the U.S. Constitution and the laws of the United States. The United States government does not punish or penalize those who peacefully express their views in the public sphere, even when those views are critical of the government. Indeed, dissent is a valuable and valued part of our politics: democracy provides a marketplace for ideas, and in order to function as such, new ideas must be permitted, even if they are unpopular or potentially offensive. The United States also has a free, thriving, and diverse independent press—a feature that existed before the advent of electronic and digital media and that continues today.

I. Application of Article 19(3)

3. The United States agrees with the Committee that the right is the norm and the restriction is the exception. The United States also agrees that any restrictions on freedom of expression must meet a strict test of justification. In fact, in ratifying the Covenant, the United States issued a declaration stating that it is the view of the United States that "States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party, may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations." In U.S. constitutional practice, restrictions on expression are subjected to a strict scrutiny test and content restriction must be shown to be narrowly tailored to meet a compelling governmental interest.

4. In general, the United States believes the draft's section on "The Application of Article 19(3)" should be streamlined to make clear the threshold premise that any restrictions on expression must comply with the requirements of Article 19(3), namely, that such restrictions are

⁷ *Draft General Comment No. 34: Article 19*, Human Rights Committee, hundredth session, Geneva, Oct. 11-29, 2010. Available at:

<http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

only such as are provided “by law” and “necessary.” The United States is of the view that such restrictions on expression must be prescribed by laws that are accessible, clear, and subject to judicial scrutiny; are necessary (e.g., the measures must be the least restrictive means for protecting the governmental interest and are compatible with democratic principles); and should be narrowly tailored to fulfill a legitimate government purpose, such as the protection of national security (e.g., countering dissemination of weapons-making instructions for terrorist purposes), public order, public health and morals (e.g., countering child pornography), and the rights and reputations of others (e.g., countering copyright infringement and libel). Given that the two limitative areas (for respect of the rights or reputations of others, and for protection of national security or of public order, or of public health or morals) are often used as pretext for unduly broad restrictions on expression, it is imperative that the Committee emphasize the importance that any restrictions on expression be necessary and in law.

5. Specifically, the United States believes that the Committee should make clear in paragraph 22 that any restrictions on freedom of expression must comply with Article 19(3) rather than saying that restrictions should not put the right in jeopardy, which could be misinterpreted to allow restrictions on expression that go beyond the exceptions allowed in Article 19(3). Similarly, the United States believes that the Committee’s suggestion in paragraph 23 of “public safety”—offered as an example of grounds for permissible restrictions on other rights under the Covenant, that is not applicable under article 19(3)—risks confusion and should be deleted, given the great potential for overlap between public safety and public order.

6. In paragraph 24 of the Draft General Comment the Committee states “[a]ll allegations of attacks on or other forms of intimidation or harassment of journalists, human rights defenders and others should be vigorously investigated, the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.” The United States believes the latter clause should be clarified to state those whose rights under Article 19 are violated should have access to effective remedies, as is stated in the source cited by the Committee in this paragraph.

7. In paragraph 25 of the Draft General Comment, the Committee discusses Article 19(3)’s requirement that any restriction on freedom of expression must be provided for by law. The United States presumes “law” includes both laws passed by democratically-elected legislatures and independent judicial decisions and therefore we see no need to include “and, where appropriate, case law.”

8. While the United States agrees that treason laws and provisions related to national security that impact freedom of expression should be carefully drafted, paragraph 31, as currently drafted, is overbroad and is not reflective of Article 19(3). The paragraph states “[i]t is not compatible with paragraph 3, for instance, to invoke treason laws to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated information of legitimate public interest.” There may be the rare situation where such persons share information that is considered to be in the legitimate public interest that is also contrary to national security and thereby may be restricted pursuant to Article 19(3). Similarly, while we do not object to the general thrust of the Committee’s broad assertion that it is not “generally appropriate to include in the remit of a state secrets law such categories of information as those relating to the commercial sector, banking and scientific progress,” there may be instances where scientific or technological information is also related to national security and therefore could be restricted under Article 19(3), so long as all of the requirements of Article 19(3), as discussed above, are met.

9. In paragraphs 29 through 33 of the draft General Comment, the Committee proceeds to elaborate the grounds for permissible restrictions on expression without first identifying, as it does later in paragraph 34, that “[r]estrictions must be ‘necessary’ for a legitimate purpose.” However, the Committee should first make clear, consistent with its description in paragraph 23, that the only legitimate purposes are those in Article 19(3), subparagraphs a and b. Further the Committee should also clarify that for a restriction to be “necessary,” it must be the least restrictive means for protecting one of the legitimate purposes described in 19(3), it cannot be overly broad, and must be narrowly tailored to prohibit the least amount of expression possible.

10. The Committee’s discussion, in paragraph 35 of the draft General Comment on the principle of proportionality, also appears disconnected to the discussion in paragraph 23. General Comment 27, to which the Committee cites in paragraph 35, concerns an article of the Covenant unrelated to Article 19, the topic of this draft General Comment. The principle of proportionality, as discussed in paragraph 35, appears to depart from the strict test of justification as discussed in paragraph 23 and as is required for any permissible limitation of the freedom of expression under Article 19(3). The United States respectfully recommends that the Committee revise this section for greater clarity, precision reflective of the language in Article 19(3) and the principles discussed in paragraph 4 of these Observations.

II. The Relationship Between Articles 19 and 20

11. The United States has a reservation to Article 20 given its potential to be interpreted and applied in an overbroad manner. The United States respectfully submits that the Committee’s discussion of “the relationship of articles 19 and 20” could be clarified in a few respects. For example, the draft states that “[t]he acts that are addressed in article 20 are of such an extreme nature that they would all be subject to restriction pursuant to article 19 paragraph 3.” It then proceeds immediately to propose that “a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3, which lays down requirements for determining *whether* restrictions on expression are permissible” (emphasis added). The United States urges the Committee to redraft that section to emphasize that any prohibition on expression thought to fall under Article 20 also needs to meet the requirements for restrictions on expression under Article 19(3). Therefore such restrictions on expression must be in law and must be necessary to meet the objectives specified either in 19(3)(a) or 19(3)(b). (See discussion of these requirements in paragraph 4 above).

12. Given the strict requirements that restrictions on expression must meet under Article 19(3), the United States believes, contrary to the implication of the draft comment, that it will rarely be the case that expression can be prohibited under Article 20. To be prohibited under Article 20, expression must first constitute advocacy of religious, national or racial hatred that constitutes incitement to discrimination, hostility or violence, and its prohibition must be provided by law, and *necessary* to respect the rights or reputations of others or to protect public order or national security. To be *necessary*, a restriction on expression, including a prohibition, must be the least restrictive means for protecting the governmental interest, must restrict the least amount of speech possible, and must be compatible with democratic principles. Consequently, the United States believes that only a narrow amount of expression could ultimately be prohibited under Article 20. Indeed, to protect public order or national security, it is not *necessary* to prohibit all advocacy of racial, religious or national hatred. There are other less restrictive (and more effective) means of protecting public order in the face of this type of expression. For example, a combination of efforts can protect public order in the face of hateful expression: ensuring robust protections for freedom of expression of all individuals allows

everyone to have a voice and to counter any offensive speech, encouraging government leaders to speak out against such speech, promoting initiatives to create environments of mutual respect and understanding, reaching out to affected communities, providing conflict-resolution services, and rigorously enforcing anti-discrimination and violent hate crimes laws to contribute to a climate of respect. The efficacy of these types of actions in maintaining public order in the face of hostile expression negates any premise that a prohibition on advocacy of hatred, even when some may consider it amounting to incitement to hostility, discrimination or violence, is *necessary* for public order or national security. In fact, there are instances in which such prohibitions can actually contribute to discrimination, hostility or violence.

13. This is not to say it is never necessary to prohibit any hateful expression—there are some types of advocacy of national, religious, or racial hatred, namely incitement to *imminent* violence, or to imminent hostile acts such as when genuine, intentional threats of violence or intimidation are made to an individual, whereby prohibition is a legitimate government response to protect public order given the potential immediacy of the harm that may be caused by the speech. Given the difficulties in countering or preventing violence resulting from incitement to imminent violence or to hostile acts due to its immediacy, it is an appropriate governmental response to prohibit such expression to maintain public order without risking the underlying human right.

14. Paragraph 53 of the draft General Comment could be made stronger by stating explicitly that the requirements of Article 19(3) (see paragraph 11 above) apply to prohibitions under Article 20.

III. Blasphemy Laws

15. The United States agrees with the Committee in paragraph 50 of the draft that as a legal matter “[b]lasphemy prohibitions and other prohibitions of display of disrespect to a religion or other belief system may not be applied in a manner that is incompatible with the paragraph 3 or other provisions of the Covenant...” However, as a practical matter, experience has shown that it is nearly impossible to have blasphemy prohibitions that do not unduly restrict freedoms of religion or expression and that are not applied in a discriminatory manner. Such laws generally do not meet the test provided for in Article 19(3) because they are not necessary to protect the rights or reputation of others, and are likely unnecessary for maintaining public order, as they seek only to protect particular viewpoints. Further, it is contrary to the freedom of expression and democratic values to provide what is essentially a “heckler’s veto,” that is, to allow an individual who finds something insulting to have the ability to restrict another’s freedom of expression. Restrictions on expression are not permissible under Article 19(3) simply because one person or group finds a particular expression to be offensive. Indeed, the United States would also disagree with the apparent suggestion in the draft that provisions on blasphemy, or on disrespect for religion or other belief systems need not be repealed “other than in the specific context of compliance with article 20.”

16. In fact, blasphemy laws are often used to deter and/or punish dissent or criticism of religious or political leaders. Indeed, such provisions are often used against members of religious minorities or dissident members of majority religious groups. As such, they can undermine the human rights of those expressing minority or dissenting views, for example, by restricting their freedom of expression or their ability to practice their religion if it is not in line with the majority view. The United States believes it is unlikely that blasphemy prohibitions can be applied in a manner that is compatible with the rights enshrined in the Covenant, and recommends that the Committee clarify and underscore the imperative—in this context—of the

promotion and protection of the fundamental freedoms of expression and religion, and the application of article 5 of the Covenant. This is particularly the case when such laws are applied to criticisms of institutions, opinions, or other subjective topics that are not subject to verification.

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2. Internet Freedom

On February 15, 2011, Secretary Clinton delivered a speech on internet freedom, following up on a speech she delivered on the subject in 2010. See *Digest 2010* at 303-5. In her February 2011 speech, available at www.state.gov/secretary/rm/2011/02/156619.htm, Secretary Clinton reaffirmed the U.S. commitment to supporting internet freedom as a platform for exercising the universal freedoms of expression, assembly, and association. She said:

The internet has become the public space of the 21st century—the world’s town square, classroom, marketplace, coffeehouse, and nightclub. ... To maintain an internet that delivers the greatest possible benefits to the world, we need to have a serious conversation about the principles that will guide us, what rules exist and should not exist and why, what behaviors should be encouraged or discouraged and how.

She proceeded to discuss several major challenges of ensuring a free and open internet: first, achieving both liberty and security; second, protecting both transparency and confidentiality; and third, protecting free expression while fostering tolerance and civility. Secretary Clinton also reviewed U.S. initiatives to promote internet freedom and counter internet repression.

On June 3, 2011, Anna Mansfield, U.S. Deputy Legal Adviser, delivered a statement on behalf of the U.S. delegation to the 17th Session of the Human Rights Council regarding the recent report of the special rapporteur on freedom of expression, which focused on internet freedom. Ms. Mansfield’s statement, excerpted below, is available at <http://geneva.usmission.gov/2011/06/03/u-s-statement-internet-access-and-violence-against-women/>.

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The United States thanks Special Rapporteur La Rue for his report. We strongly support his affirmation of the freedom of opinion and expression as underpinning and protecting other human rights. We appreciate his timely focus on access to electronic communications and freedom of expression on the Internet. The dramatic events unfolding in North Africa, the Middle East and beyond highlight the importance of new communications tools for providing new avenues to exercise the freedom of expression, and allowing people everywhere to articulate their democratic aspirations.

As the report correctly states, Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were drafted with foresight to include technological developments through which individuals can exercise their right to freedom of expression. This includes the freedom “to seek, receive and impart information and ideas through any media and regardless of frontiers,” providing the same strong protections for online speech as they do for offline speech.

We agree that “the right to freedom of expression includes expression of views and opinions that offend, shock or disturb,” and that legitimate restrictions on expression allowed under international human rights law are “few, exceptional and limited.” The United States does not believe that there should be limitations on hate speech generally, unless it constitutes incitement to imminent violence. We therefore support the concept that “there should be as little restriction as possible to the flow of information via the Internet.”

We strongly condemn the brutal methods used by some governments to silence dissent, and we are concerned by the report that in 2010, 109 bloggers were in prison on charges related to the content of their expression. We urge Member States to remove domestic legal provisions that improperly criminalize or otherwise improperly limit the freedom of expression.

States must ensure that Internet access is available, even during times of political unrest. It is unacceptable for a government to suspend user accounts on social networking sites, or to cut off access entirely, for engaging in non-violent political speech. The United States encourages the Special Rapporteur to further examine the role of states in disabling national or regional Internet access for political reasons.

We are also concerned with the Special Rapporteur’s report of increasing denial of service attacks on civil society. We urge Member States to adopt measures to prevent such acts, and to hold those responsible to account.

The United States suggests that the Special Rapporteur expand his inquiry on the influence of governments over communications companies. We would be interested in a study of whether governments are improperly requiring corporations to censor content and to participate in surveillance and monitoring of citizens, as a condition for operating a business in the country.

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On June 10, 2011, the United States joined 39 other countries in a joint statement introduced by Sweden at the Human Rights Council on freedom of expression on the internet. The joint statement, available at www.sweden.gov.se/sb/d/14194/a/170566, included the following:

The Internet should not be used as a platform for activities prohibited in human rights law. However, we believe, as does the Special Rapporteur, that there should be as little restriction as possible to the flow of information on the Internet. Only in a few exceptional and limited circumstances can restrictions on content be acceptable. Such restrictions must comply with international human rights law, notably article 19 of the ICCPR. We consider Government-initiated closing down of the Internet, or major parts thereof, for purposes of suppressing free speech, to be in violation of freedom of expression. In addition, Governments should not mandate a more restrictive standard

for intermediaries than is the case with traditional media regarding freedom of expression or hold intermediaries liable for content that they transmit or disseminate.

At the 18th session of the Human Rights Council in September 2011, the United States joined consensus on a decision to hold a panel discussion during the March 2012 session on the subject of freedom of expression on the internet. U.N. Doc A/HRC/DEC/18/119.

Secretary Clinton addressed a conference on internet freedom at The Hague hosted by the Netherlands in December 2011. Her remarks, excerpted below, are available at www.humanrights.gov/2011/12/09/secretary-clinton-on-internet-freedom-transcript/. Secretary Clinton suggested the need for technology companies to practice good self-governance, rejected the call for a single global code of internet governance, and encouraged efforts to increase on-line access for people around the world. For additional statements and information on internet freedom, see the State Department's webpage on internet freedom, www.state.gov/e/eb/cip/netfreedom/index.htm.

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...[T]oday, as people increasingly turn to the internet to conduct important aspects of their lives, we have to make sure that human rights are as respected online as offline. After all, the right to express one's views, practice one's faith, peacefully assemble with others to pursue political or social change—these are all rights to which all human beings are entitled, whether they choose to exercise them in a city square or an internet chat room. And just as we have worked together since the last century to secure these rights in the material world, we must work together in this century to secure them in cyberspace.

This is an urgent task. It is most urgent, of course, for those around the world whose words are now censored, who are imprisoned because of what they or others have written online, who are blocked from accessing entire categories of internet content, or who are being tracked by governments seeking to keep them from connecting with one another.

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...[I]ncidents worldwide remind us of the stakes in this struggle. And the struggle does not belong only to those on the front lines and who are suffering. It belongs to all of us: first, because we all have a responsibility to support human rights and fundamental freedoms everywhere. Second, because the benefits of the network grow as the number of users grow. The internet is not exhaustible or competitive. My use of the internet doesn't diminish yours. On the contrary, the more people that are online and contributing ideas, the more valuable the entire network becomes to all the other users. In this way, all users, through the billions of individual choices we make about what information to seek or share, fuel innovation, enliven public debates, quench a thirst for knowledge, and connect people in ways that distance and cost made impossible just a generation ago.

But when ideas are blocked, information deleted, conversations stifled, and people constrained in their choices, the internet is diminished for all of us. What we do today to preserve

fundamental freedoms online will have a profound effect on the next generation of users. More than two billion people are now connected to the internet, but in the next 20 years, that number will more than double. And we are quickly approaching the day when more than a billion people are using the internet in repressive countries. The pledges we make and the actions we take today can help us determine whether that number grows or shrinks, or whether the meaning of being on the internet is totally distorted.

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... I'd like to briefly discuss three specific challenges that defenders of the internet must confront.

The first challenge is for the private sector to embrace its role in protecting internet freedom. Because whether you like it or not, the choices that private companies make have an impact on how information flows or doesn't flow on the internet and mobile networks. They also have an impact on what governments can and can't do, and they have an impact on people on the ground.

In recent months, we've seen cases where companies, products, and services were used as tools of oppression. Now, in some instances, this cannot be foreseen, but in others, yes, it can. A few years ago, the headlines were about companies turning over sensitive information about political dissidents. Earlier this year, they were about a company shutting down the social networking accounts of activists in the midst of a political debate. Today's news stories are about companies selling the hardware and software of repression to authoritarian governments. When companies sell surveillance equipment to the security agency of Syria or Iran or, in past times, Qadhafi, there can be no doubt it will be used to violate rights.

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... A range of resources emerged in recent years to help companies work through these issues. The UN Guiding Principles on Business and Human Rights, which were adopted in June, and the OECD Guidelines for Multinational Enterprises both advise companies on how to meet responsibilities and carry out due diligence. And the Global Network Initiative, which is represented here tonight, is a growing forum where companies can work through challenges with other industry partners, as well as academics, investors, and activists.

And of course, companies can always learn from users. The Silicon Valley Human Rights Conference in October brought together companies, activists, and experts to discuss real life problems and identify solutions. And some participants issued what they called the Silicon Valley Standard for stakeholders to aspire to.

Working through these difficult questions by corporate executives and board members should help shape your practices. Part of the job of responsible corporate management in the 21st century is doing human rights due diligence on new markets, instituting internal review procedures, identifying principles by which decisions are to be made in tough situations, because we cannot let the short-term gains that all of us think are legitimate and worth seeking jeopardize the openness of the internet and human rights of individuals who use it without it coming back to haunt us all in the future. Because a free and open internet is important not just to technology companies but to all companies. Whether it's run with a single mobile phone or an extensive

corporate network, it's hard to find any business today that doesn't depend in some way on the internet and doesn't suffer when networks are constrained.

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But even as companies must step up, governments must resist the urge to clamp down, and that is the second challenge we face. If we're not careful, governments could upend the current internet governance framework in a quest to increase their own control. Some governments use internet governance issues as a cover for pushing an agenda that would justify restricting human rights online. We must be wary of such agendas and united in our shared conviction that human rights apply online.

So right now, in various international forums, some countries are working to change how the internet is governed. They want to replace the current multi-stakeholder approach, which includes governments, the private sector, and citizens, and supports the free flow of information, in a single global network. In its place, they aim to impose a system cemented in a global code that expands control over internet resources, institutions, and content, and centralizes that control in the hands of governments.

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In effect, the governments pushing this agenda want to create national barriers in cyberspace. This approach would be disastrous for internet freedom. More government control will further constrict what people in repressive environments can do online. It would also be disastrous for the internet as a whole, because it would reduce the dynamism of the internet for everyone. Fragmenting the global internet by erecting barriers around national internets would change the landscape of cyberspace. In this scenario, the internet would contain people in a series of digital bubbles, rather than connecting them in a global network. Breaking the internet into pieces would give you echo chambers rather than an innovative global marketplace of ideas.

The United States wants the internet to remain a space where economic, political, and social exchanges flourish. To do that, we need to protect people who exercise their rights online, and we also need to protect the internet itself from plans that would undermine its fundamental characteristics.

Now, those who push these plans often do so in the name of security. And let me be clear: The challenge of maintaining security and of combating cyber crime, such as the theft of intellectual property, are real—a point I underscore whenever I discuss these issues. There are predators, terrorists, traffickers on the internet, malign actors plotting cyber attacks, and they all need to be stopped. We can do that by working together without compromising the global network, its dynamism, or our principles.

...[T]he United States supports the public-private collaboration that now exists to manage the technical evolution of the internet in real time. We support the principles of multi-stakeholder internet governance developed by more than 30 nations in the OECD earlier this year. A multistakeholder system brings together the best of governments, the private sector, and civil society, and most importantly, it works. It has kept the internet up and running for years all over the world. So to use an American phrase, our position is, "If it ain't broke, don't fix it." And there's no good reason to replace an effective system with an oppressive one.

The third and final challenge is that all of us—governments, private sector, civil society—must do more to build a truly global coalition to preserve an open internet, and that's where all of you here today come in. Because internet freedom cannot be defended by one

country or one region alone. Building this global coalition is hard, partly because, for people in many countries, the potential of the internet is still unrealized. While it's easy for us in the United States or in the Netherlands to imagine what we would lose if the internet became less free, it is harder for those who have yet to see the benefits of the internet in their day-to-day lives. So we have to work harder to make the case that an open internet is and will be in everyone's best interests. And we have to keep that in mind as we work to build this global coalition and make the case to leaders of those countries where the next generation of internet users live. These leaders have an opportunity today to help ensure that the full benefits are available to their people tomorrow, and in so doing, they will help us ensure an open internet for everyone.

So the United States will be making the case for an open internet in our work worldwide, and we welcome other countries to join us. ...[L]et's lay the groundwork now for these partnerships that will support an open internet in the future. And in that spirit I want to call attention to two important items on your agenda for tomorrow.

The first will be to build support for a new cross-regional group that will work together in exactly the way that I've just discussed—based on shared principles, providing a platform for governments to engage creatively and energetically with the private sector, civil society, and other governments. Several countries have already signaled their intention to join, I hope others here will do the same, and going forward, others will endorse the declaration that our Dutch hosts have prepared. It's excellent work, Uri, and we thank you for your leadership.

The second item I want to highlight is a practical effort to do more to support cyber activists and bloggers who are threatened by their repressive governments. The Committee to Protect Journalists recently reported that of all the writers, editors, and photojournalists now imprisoned around the world, nearly half are online journalists. The threat is very real. Now several of us already provide support, including financial support, to activists and bloggers, and I was pleased that the EU recently announced new funding for that purpose. And I know that other governments, including the Netherlands, are also looking for ways to help out.

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Our government will continue to work very hard to get around every barrier that repressive governments put up. Because governments that have erected barriers will eventually find themselves boxed in, and they will face a dictator's dilemma. They will have to choose between letting the walls fall or paying the price for keeping them standing by resorting to greater oppression, and to escalating the opportunity cost of missing out on the ideas that have been blocked \ and the people who have been disappeared.

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3. Religion

a. Freedom of religion

(1) Designations under the International Religious Freedom Act

On August 18, 2011, the Secretary Clinton redesignated Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, and Uzbekistan, respectively, as a “country of particular concern” under § 402(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended. The eight states were so designated “for having engaged in or tolerated particularly severe violations of religious freedom.” 77 Fed. Reg. 20,687 (March 30, 2012). The presidential actions designated for each of those countries by the secretary are listed in the Federal Register notice.

(2) Annual Report on International Religious Freedom

On September 13, 2011, the Department of State released a Report on International Religious Freedom, covering the period July 1, 2010 through December 31, 2010, and transmitted the report to Congress pursuant to § 102(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended, 22 U.S.C. § 6412(b). The report is available at www.state.gov/g/drl/rls/irf/2010_5/index.htm. The report covers six months, rather than an entire year as in past reports, because the Department shifted to a calendar year reporting period. Remarks by Assistant Secretary for the Bureau of Democracy, Human Rights, and Labor Michael H. Posner and Ambassador-at-Large for International Religious Freedom Suzan Johnson Cook, on the release of the report are available at www.state.gov/g/drl/rls/rm/2011/172274.htm. Secretary Clinton’s statement on the release of the report is available at www.state.gov/secretary/rm/2011/09/172254.htm.

b. Combating discrimination based on religion

(1) Human Rights Council resolution

On March 24, 2011, the Human Rights Council adopted by consensus a landmark resolution on “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.” U.N. Doc. S/RES/HRC/RES/16/18. Unlike past resolutions on so-called “defamation of religion,” this resolution sought to combat religious intolerance through action-oriented approaches that do not limit the freedom of expression or infringe on the freedom of religion. Secretary Clinton welcomed adoption of the resolution in a statement issued March 24 and available at <http://geneva.usmission.gov/2011/03/24/adoption-of-resolution-at-human-rights-council-combating-discrimination-and-violence/>. Ambassador Rice also issued a statement welcoming the resolution on March 24, which is available at <http://usun.state.gov/briefing/statements/2011/159144.htm>. Set forth below is the United States’ explanation of position on the resolution.

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The United States is pleased to join consensus on this resolution. We congratulate the sponsors of this resolution for what we hope can become a blueprint for constructive, meaningful actions that the international community will take to promote respect for religious differences. We have for some years shared the stated concerns of the sponsors and others about intolerance, discrimination and violence directed against persons on the basis of their religion or belief. It is deeply concerning that these problems persist in the 21st century in all regions of the world. As Secretary Clinton indicated here three weeks ago, it is time for the Council to step up efforts to combat these problems so as to make tangible improvements in people's lives. This resolution establishes the way forward.

The United States had been unable to support previous efforts of the sponsors to address these very real and serious problems not because we disagreed with the stated goals but because those efforts in our view paid insufficient attention to the individual-centered focus of international human rights law and relied in great measure on seeking to impose legal restrictions on expression as a means to combat intolerance, discrimination and violence based on religion or belief. Not only do we believe such restrictions are wrong and violate universal freedoms of expression and religion; we also are convinced that they are counterproductive and exacerbate the very problems they ostensibly seek to address. We have seen in various parts of the world how governments have misused laws that criminalize offensive expression to persecute political opponents and minorities. In some cases those engaged in religiously motivated violence or murder have pointed to such laws as justification for their actions.

The resolution being adopted today allows for criminalization of expression in only one circumstance—incitement to imminent violence. It calls upon states to take different types of measures to counter all other forms of offensive expression, ranging from education and awareness building to interfaith efforts to urging political, religious and societal leaders to speak out and condemn offensive expression. The resolution specifically recognizes that the most effective antidote to offensive expression is more expression and the “open public debate of ideas,” not laws that restrict expression in the name of tolerance. The approach taken by this resolution is one that upholds international human rights standards.

The resolution also sets forth a specific menu of proven measures to prohibit discrimination and invidious profiling, and calls upon states to enforce those prohibitions effectively. The resolution also calls on states to implement laws to prohibit hate crimes against persons, which are violent crimes such as assault, property destruction, or even murder, motivated by, among other things, bias based on religion or belief. And it expressly recognizes the importance of providing all adherents of religions or beliefs equal protection of the law.

Mr. Chairman, each of us has a lot of work to do to turn the actions recommended in this resolution into reality. To succeed, the approach outlined here must be more than words on paper in a UN resolution. It must be a call to action for each of our governments to take the assertive, concrete measures specified in the resolution. The United States urges member states to heed the call in the resolution to provide updates on the efforts they are making in this regard as part of ongoing reporting to OHCHR. For our part, we will continue to advocate for robust implementation at home and in all parts of the world and will be working to develop follow on activities to further that goal.

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Human Rights Council Resolution 16/18 called for the next session of the Human Rights Council (the 17th Session) to convene a panel on combating intolerance and discrimination based on religion or belief. Ambassador Cook spoke at that panel on June 14, 2011. Ambassador Cook's remarks are excerpted below and available in full at <http://geneva.usmission.gov/2011/06/14/political-leaders-have-obligation-to-counter-religious-intolerance/>.

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States have tools at their disposal to combat religious intolerance; in many cases what is needed is the political will to use them. Governments need to develop robust legal protections to address acts of discrimination against individuals and bias-inspired violent crimes. Each country should determine if it has laws on the books that allow it to prosecute individuals who discriminate on the basis of religion in hiring, access to public accommodation and other aspects of public life, or who commit violence on that basis. Each country should determine if it has a capable and dedicated band of investigators and prosecutors to enforce such laws. Even more importantly, leaders in government, politics, religion, business and the rest of society must stand ready to condemn hateful ideology; and to vigorously defend the rights of individuals to practice their religion freely and exercise their freedom of expression. Leaders who remain silent are contributing to the problem and should be held politically accountable. Let me give some examples drawn from practice in the United States.

Combating Discrimination through robust legal protections:

The U.S. Department of Justice is the primary institution responsible for enforcing federal statutes that prohibit discrimination or acts of violence and intimidation on the basis of race, national origin, and religion. Bias-inspired violent crimes are prosecuted to the fullest extent of federal law for especially severe punishment. Each state in the United States has similar legal protections and entities responsible for enforcing them.

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Condemn Hateful Ideology and Outreach to Affected Groups:

Legal safeguards are essential, but it is better to create a climate that seeks to prevent discrimination and violence before it happens, than to punish after the fact. This requires the commitment and courage of political and societal leaders. ...

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The Civil Rights Division of the Justice Department engages in extensive outreach to address September 11th backlash-related civil rights issues, by providing speakers at national and regional conventions and other community events, and hosting a bi-monthly meeting that brings together community leaders with officials from a variety of federal agencies to comprehensively address civil rights issues.

The United States Department of Homeland Security also works to improve the cultural competency of its personnel and leads training for Federal, State, and local law enforcement on

effective policing without ethnic or racial profiling; best practices related to community engagement; and misconceptions and stereotypes of Islam and Muslims, for example.

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Vigorously Defend the Freedoms of Religion, Belief, and Expression:

Our founding fathers, understanding the importance of freedom of religion, made it first in our Bill of Rights. In 1790, George Washington wrote to a synagogue in Rhode Island, that this country will give “to bigotry no sanction, to persecution no assistance.”

Rather than seek prohibitions on offensive expression, the United States advocates for other measures such as urging political, religious, and societal leaders to speak out and condemn offensive expression; creating a mechanism to identify areas of tension between communities; training government officials on outreach strategies; and encouraging leaders to discuss causes of discrimination and potential solutions with their communities. Indeed, we believe that laws seeking to limit freedom of expression in the name of protecting against offensive speech are actually counterproductive. The suppression of speech often actually raises the profile of that speech, sometimes giving even greater voice to speech that others might find offensive. In some countries, politicians will not condemn offensive speech, but instead will defer to the courts to judge if it is legally prohibited. In our view it is far more effective if political leaders know that they cannot point to the law as an excuse for doing little to nothing. They have a moral and political obligation to use their own freedom of expression to lead a strong counter effort, and should be held to account politically.

As I have said before no country is immune from the problems of intolerance and hatred, but governments can and must respond in ways that promote the human rights of all individuals. Here in this room where consensus and unity was achieved, I wish to conclude by thanking you for this opportunity. I hope that together we will move forward to achieve the substantial goal of combating religious intolerance, discrimination and violence.

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(2) General Assembly resolution

On November 15, 2011, the United States joined consensus on a resolution adopted by the Third Committee of the UN General Assembly on combating intolerance, negative stereotyping, stigmatization, discrimination, and incitement to violence against persons, based on religion or belief. The resolution was adopted by the General Assembly by consensus, without a vote, on December 19, 2011. U.N. Doc. A/RES/66/168. U.S. Deputy Representative Sammis provided an explanation of the U.S. position on the resolution, excerpted below and available at

<http://usun.state.gov/briefing/statements/2011/178683.htm>.

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The U.S. is pleased to join consensus on this resolution. We congratulate the sponsors of this resolution for what we hope is becoming a blueprint for constructive, meaningful actions that States and the international community will take to promote respect for religious differences. We are glad that the landmark consensus reached at the Human Rights Council in Geneva on this issue has also taken hold here. We have for some years shared the stated concerns of the sponsors and others about intolerance, discrimination and violence directed against persons on the basis of their religion and belief. It is deeply concerning that these problems persist in the 21st century in all regions of the world.

As was also true in Geneva, the U.S. had not been able to support previous efforts of the sponsors to address these very real and serious problems in this body because those efforts relied in great measure on seeking to impose restrictions on expression as a means to combat intolerance, discrimination and violence based on religion or belief. Not only do we believe such restrictions are wrong and violate freedoms of expression and religion; we also are convinced that they are counterproductive and exacerbate the very problems they ostensibly seek to address. We have seen in various parts of the world how laws that criminalize offensive expression have been misused by governments and to persecute political opponents and minorities. In some cases those who have engaged in religiously motivated violence or murder have pointed to such laws as justification for their actions.

The resolution being adopted today, however, follows the path set by the landmark HRC resolution 16/18 and provides for criminalization of expression in only one circumstance—incitement to imminent violence. It calls upon states to take different types of measures to counter all other forms of offensive expression, ranging from education and awareness building to interfaith efforts to urging political, religious and societal leaders to speak out and condemn offensive expression. The resolution specifically recognizes that the most effective antidote to offensive expression is more expression and the “open public debate of ideas,” not laws that restrict expression in the name of tolerance. The approach taken by this resolution is one that upholds respect for universal human rights.

The resolution calls for measures to prohibit discrimination and invidious profiling, and calls upon states to enforce those prohibitions effectively. The resolution also calls on states to implement laws to prohibit hate crimes against persons, which are violent crimes such as harassment, assault, property destruction, or even murder, motivated by, among other things, bias based on religion or belief. And it expressly recognizes the importance of providing all adherents of religions or beliefs equal protection of the law. The United States welcomes all international, national, and regional initiatives that respect universal human rights and that recommend these types of measures to promote interfaith harmony and combating discrimination against individuals on the basis of religion or belief. Such initiatives can promote respect for religious diversity in a manner that respects universal human rights.

Mr. Chairman, each of us has a lot of work to do to turn the actions recommended in this resolution into reality. To succeed, the approach outlined here must be more than words on paper in a UN resolution. It must be a call to action for each of our governments to take assertive, concrete measures to uphold its international obligations and to promote awareness and understanding of the sensitive issues the resolution addresses. In July, to help ensure that this call to action is implemented, Secretary Clinton co-chaired a Ministerial meeting with OIC Secretary General Ihsanoglu in Istanbul to promote implementation of the actions called for in HRC Resolution 16/18. We look forward to the series of implementation meetings that begin next month, the outcome of which will be shared with relevant UN offices, such as the OHCHR. In

line with these implementation efforts, the United States urges member states to heed the call in the resolution to provide updates on the efforts they are making in this regard as part of ongoing reporting to OHCHR.

We wish to extend our appreciation to all delegations who have worked in a constructive spirit of dialogue and mutual understanding in order to reach this result. We remain committed to trying to ensure that this positive approach becomes the basis for joint efforts to make the promise of this resolution a reality around the world.

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(3) The “Istanbul Process” to implement Resolution 16/18

On July 15, 2011, Secretary Clinton met with Secretary General of the Organization of Islamic Cooperation (“OIC”) Ekmeleddin Ihsanoglu along with other foreign ministers in Istanbul as part of a high-level meeting on combating religious intolerance. As co-chairs of the meeting, Secretary Clinton and the secretary general of the OIC issued a “Joint Statement on Combating Intolerance, Discrimination, and Violence Based on Religion or Belief,” set forth below and also available at www.state.gov/r/pa/prs/ps/2011/07/168653.htm. The meeting and joint statement launched what has become known as the “Istanbul Process” for implementation of Human Rights Council Resolution 16/18.

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The Secretary of State of the United States, the Secretary General of the Organization of Islamic Cooperation, and the EU High Representative for Foreign Affairs, together with foreign ministers and officials from Australia, Belgium, Canada, Denmark, Egypt, France, Germany, Italy, Japan, Jordan, Lebanon, Morocco, Pakistan, Poland, Romania, Senegal, Sudan, Turkey, United Kingdom, the Vatican (Holy See), UN OHCHR, Arab League, and African Union, met on July 15 in Istanbul to give a united impetus to the implementation of UN Human Rights Council Resolution 16/18 on “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief.” The meeting was hosted by the Organization of Islamic Cooperation at the OIC/IRCICA premises in the historic Yildiz Palace in Istanbul and co-chaired by the OIC Secretary-General H.E Prof. Ekmeleddin Ihsanoglu and U.S. Secretary of State H.E. Mrs. Hillary Rodham Clinton.

They called upon all relevant stakeholders throughout the world to take seriously the call for action set forth in Resolution 16/18, which contributes to strengthening the foundations of tolerance and respect for religious diversity as well as enhancing the promotion and protection of human rights and fundamental freedoms around the world.

Participants resolved to go beyond mere rhetoric and to reaffirm their commitment to freedom of religion or belief and freedom of expression by urging States to take effective measures, as set forth in Resolution 16/18, consistent with their obligations under international human rights law, to address and combat intolerance, discrimination, and violence based on religion or belief. The co-chairs of the meeting committed to working together with other

interested countries and actors on follow up and implementation of Resolution 16/18 and to conduct further events and activities to discuss and assess implementation of the resolution. Participants are encouraged to consider to provide updates, as part of ongoing reporting to the Office of the High Commissioner for Human Rights, on steps taken at the national level on the implementation of Resolution 16/18, building also on related measures in the other resolutions adopted by consensus on freedom of religion or belief and on the elimination of religious intolerance and discrimination.

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Secretary Clinton delivered remarks at the high-level meeting in which she elaborated on steps the U.S. would take to implement Resolution 16/18. Her remarks, excerpted below, are available at www.state.gov/secretary/rm/2011/07/168636.htm.

* * * *

I want to applaud the Organization of Islamic Conference and the European Union for helping pass Resolution 16/18 at the Human Rights Council. I was complimenting the secretary general on the OIC team in Geneva. I had a great team there as well. So many of you were part of that effort. And together we have begun to overcome the false divide that pits religious sensitivities against freedom of expression, and we are pursuing a new approach based on concrete steps to fight intolerance wherever it occurs. Under this resolution, the international community is taking a strong stand for freedom of expression and worship, and against discrimination and violence based upon religion or belief.

These are fundamental freedoms that belong to all people in all places, and they are certainly essential to democracy. But as the secretary general just outlined, we now need to move to implementation. The resolution calls upon states to protect freedom of religion, to counter offensive expression through education, interfaith dialogue, and public debate, and to prohibit discrimination, profiling, and hate crimes, but not to criminalize speech unless there is an incitement to imminent violence. We will be looking to all countries to hold themselves accountable and to join us in reporting to the UN's Office of the High Commissioner of Human Rights on their progress in taking these steps.

For our part, I have asked our Ambassador-at-Large for Religious Freedom, Suzan Johnson Cook, to spearhead our implementation efforts. And to build on the momentum from today's meeting, later this year the United States intends to invite relevant experts from around the world to the first of what we hope will be a series of meetings to discuss best practices, exchange ideas, and keep us moving forward beyond the polarizing debates of the past; to build those muscles of respect and empathy and tolerance that the secretary general referenced. It is essential that we advance this new consensus and strengthen it, both at the United Nations and beyond, in order to avoid a return to the old patterns of division.

The Human Rights Council has given us a comprehensive framework for addressing this issue on the international level. But at the same time, we each have to work to do more to promote respect for religious differences in our own countries. In the United States, I will admit, there are people who still feel vulnerable or marginalized as a result of their religious beliefs.

And we have seen how the incendiary actions of just a very few people, a handful in a country of nearly 300 million, can create wide ripples of intolerance. We also understand that, for 235 years, freedom of expression has been a universal right at the core of our democracy. So we are focused on promoting interfaith education and collaboration, enforcing antidiscrimination laws, protecting the rights of all people to worship as they choose, and to use some old-fashioned techniques of peer pressure and shaming, so that people don't feel that they have the support to do what we abhor.

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No country, including my own, has a monopoly on truth or a secret formula for ethnic and religious harmony. This takes hard work and persistence and patience. But wherever we come from and however we worship, all of us can do more in our own lives, in our positions of leadership, and in our communities, to bridge the divides that separate us. Here in Istanbul, which for so long has symbolized a bridge between cultures and continents, we have the opportunity to recommit ourselves to this goal.

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In December, the United States hosted the first of a planned series of expert-level meetings with foreign government agencies as part of the Istanbul process to further implement Resolution 16/18. The December meeting focused on effective government strategies to engage members of religious minorities and enforcing laws prohibiting discrimination on the basis of religion or belief, two elements of Resolution 16/18. Secretary Clinton delivered remarks at the meeting on December 14, 2011, which are excerpted below and available in full at www.state.gov/secretary/rm/2011/12/178866.htm. Further information about the Istanbul Process is available at www.humanrights.gov/2011/12/10/istanbul-process/.

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Now, there are those who have always seen a tension between these two freedoms, especially when one person's speech seems to question someone else's religious beliefs, or maybe even offends that person's beliefs. But the truth we have learned, through a lot of trial and error over more than 235 years in our country, is that we defend our beliefs best by defending free expression for everyone, and it lowers the temperature. It creates an environment in which you are free to exercise and to speak about your religion, whether your neighbor or someone across the town agrees with you or not. In fact, the appropriate answer to speech that offends is more speech.

Now, in the United States, we continue to combat intolerance because it is—
unfortunately, seems to be part of human nature. It is hurtful when bigotry pollutes the public sphere, but the state does not silence ideas, no matter how disagreeable they might be, because we believe that in the end, the best way to treat offensive speech is by people either ignoring it or combating it with good arguments and good speech that overwhelms it.

So we do speak out and condemn hateful speech. In fact, we think it is our duty to do so, but we don't ban it or criminalize it. And over the centuries, what we have found is that the rough edges get rubbed off, and people are free to believe and speak, even though they may hold diametrically opposing views.

Now, with Resolution 16/18, we have clarified these dual objectives. We embrace the role that free expression plays in bolstering religious tolerance. We have agreed to build a culture of understanding and acceptance through concrete measures to combat discrimination and violence, such as education and outreach, and we are working together to achieve those objectives.

Now, I know that in the world today, intolerance is not confined to any part of the world or any group of people. We all continue to deal with different forms of religious intolerance. That's true here, that's true in Europe, that's true among countries in the Organization of Islamic Cooperation, everywhere in the world. It's true where people, if they are discriminating or intimidating, they're doing it against Muslims or Jews or Christians or Buddhists or Baha'is or you name it. There has been discrimination of every kind against every religion known to man.

And yet at the same time, it's one thing if people are just disagreeing. That is fair game. That's free speech. But if it results in sectarian clashes, if it results in the destruction or the defacement or the vandalization of religious sites, if it even results in imprisonment or death, then government must ...hold those who are responsible accountable. Government must stand up for the freedom of religion and the freedom of expression. And it's a situation which is troubling to us, because a recent study by the Pew Forum on Religion and Public Life found that 70 percent of the world's population lives in countries with a high number of restrictions on religious freedom.

In America, we are proud of our long and distinctive record of championing both freedom of speech and freedom of religion, and we have worked to share our best practices. But I have to say we have one difficulty in understanding all of the problems that we see around the world, and that is that because religion is so personal and because it is something that we highly value in ourselves, it strikes us as troubling that people are not confident in their religious beliefs to the point where they do not fear speech that raises questions about religion.

I mean, every one of us who is a religious person knows that there are some who may not support or approve of our religion. But is our religion so weak that statements of disapproval will cause us to lose our faiths? That would be most unfortunate. In fact, what we have found, in study after study, is that the United States is one of the most religious countries in the world. And yet anybody can believe anything and go anywhere. And so there is no contradiction between having strong religious beliefs and having the freedom to exercise them and to speak about them and to even have good debates with others.

And so the United States has made a commitment to support the 16/18 implementation efforts, but we also would hope that we can take practical steps to engage with members of religious minority groups. We know that antidiscrimination laws are no good if they're not enforced, and if they're not enforced equally, we know that governments which fear religion can be quite oppressive, but we know that societies which think there's only one religion can be equally oppressive.

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(4) Letter to the Editor from Assistant Secretary Posner and Ambassador Cook

After an op-ed piece appeared in *Forbes* magazine on December 30, 2011 that was critical of the United States' support for Resolution 16/18, Assistant Secretary Posner and Ambassador Cook responded in a letter to the editor. The letter appears below and is available at www.forbes.com/sites/abigaillesman/2011/12/30/could-you-be-a-criminal-us-supports-un-anti-free-speech-measure/3/.

* * * *

[Abigail R. Esman](#)'s Dec. 30, 2011 op-ed, "[Could You Be a Criminal? US Supports UN Anti-Free Speech Measure](#)," mistakenly states that U.N. Human Rights Council Resolution 16/18 seeks to limit speech that is discriminatory or involves the "defamation" of religion.

First, the resolution does not accept the approach espoused in the "defamation of religions" resolutions, which the United States has opposed for more than a decade. The U.S. Commission on [International](#) Religious Freedom declared Resolution 16/18 to be a "significant step away from the pernicious 'defamation of religions' concept."

Second, the resolution calls for prohibition of speech in only one area—the criminalization of incitement to imminent violence. The concept of barring incitement to imminent violence tracks U.S. Supreme Court jurisprudence, specifically the 1969 *Brandenburg v. Ohio* decision, which held that only in very narrow circumstances can speech be limited. The Court said that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Subsequent U.S. case law has reaffirmed this ruling and made clear that, under *Brandenburg*, the government may only restrict free speech when it is specific in its call for violence (or other lawless action) and specifies an imminent timeframe. This test has been the U.S. standard for over 40 years and does not, as Esman writes, place "limitations as well on speech considered 'blasphemous.'"

Contrary to Esman's claims, drawing a caricature of the prophet Muhammad that resulted in violence by Muslim extremists would not constitute "incitement to imminent violence" under the *Brandenburg* test. The incitement to imminent violence test does not provide a heckler's veto; an individual who finds something insulting may not restrict another's freedom of expression. Authorities may react to speech that is likely to produce imminent violence, not mere advocacy of violence or provocative speech. Therefore, Esman is not correct in claiming that by supporting criminalization of incitement to imminent violence, the United States has "agreed not to provoke." The United States was following and promoting its own constitutional standard, as it has been doing in regards to freedom of expression in international fora since the time of Eleanor Roosevelt.

We champion broad protections for freedom of expression and religion for all in the United States and throughout the world.

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M. PROMOTION OF HUMAN RIGHTS DURING THE ARAB SPRING

See discussion in sections A.3.d. and A.3.e. *supra* regarding actions taken to respond to the human rights crises in Libya and Syria. On June 3, 2011, at the 17th Session of the Human Rights Council, U.S. delegate John Mariz delivered a statement for the United States that echoed a May 19, 2011 speech delivered at the State Department by President Obama responding to developments in the Middle East and North Africa, the so-called “Arab Spring.” Daily Comp. Pres. Docs., 2011 DCPD No. 00368. Both the statement and the speech emphasized the support of the United States for promoting universal human rights, including free speech and freedom of assembly and association. Excerpts of the President’s speech appear below. ***

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The State Department is a fitting venue to mark a new chapter in American diplomacy. For 6 months, we have witnessed an extraordinary change taking place in the Middle East and North Africa. Square by square, town by town, country by country, the people have risen up to demand their basic human rights. Two leaders have stepped aside. More may follow. And though these countries may be a great distance from our shores, we know that our own future is bound to this region by the forces of economics and security, by history and by faith.

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The question before us is what role America will play as this story unfolds. For decades, the United States has pursued a set of core interests in the region: countering terrorism and stopping the spread of nuclear weapons, securing the free flow of commerce and safe-guarding the security of the region, standing up for Israel’s security and pursuing Arab-Israeli peace.

We will continue to do these things, with the firm belief that America’s interests are not hostile to people’s hopes, they’re essential to them. ...

Yet we must acknowledge that a strategy based solely upon the narrow pursuit of these interests will not fill an empty stomach or allow someone to speak their mind. Moreover, failure to speak to the broader aspirations of ordinary people will only feed the suspicion that has festered for years that the United States pursues our interests at their expense. Given that this mistrust runs both ways, as Americans have been seared by hostage-taking and violent rhetoric and terrorist attacks that have killed thousands of our citizens. A failure to change our approach threatens a deepening spiral of division between the United States and the Arab world.

And that’s why, 2 years ago in Cairo, I began to broaden our engagement based upon mutual interests and mutual respect. I believed then, and I believe now, that we have a stake not just in the stability of nations, but in the self-determination of individuals. The status quo is not sustainable. Societies held together by fear and repression may offer the illusion of stability for a time, but they are built upon fault lines that will eventually tear asunder.

*** Editor’s note: Other portions of the President’s May 19 speech appear in Chapter 17.A.

So we face a historic opportunity. We have the chance to show that America values the dignity of the street vendor in Tunisia more than the raw power of the dictator. There must be no doubt that the United States of America welcomes change that advances self-determination and opportunity. Yes, there will be perils that accompany this moment of promise. But after decades of accepting the world as it is in the region, we have a chance to pursue the world as it should be.

Of course, as we do, we must proceed with a sense of humility. It's not America that put people into the streets of Tunis or Cairo, it was the people themselves who launched these movements, and it's the people themselves that must ultimately determine their outcome.

Not every country will follow our particular form of representative democracy, and there will be times when our short-term interests don't align perfectly with our long-term vision for the region. But we can, and we will, speak out for a set of core principles, principles that have guided our response to the events over the past 6 months.

The United States opposes the use of violence and repression against the people of the region.

The United States supports a set of universal rights. And these rights include free speech, the freedom of peaceful assembly, the freedom of religion, equality for men and women under the rule of law, and the right to choose your own leaders, whether you live in Baghdad or Damascus, Sanaa or Tehran.

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Mr. Mariz's statement at the 17th Session of the Human Rights Council making reference to President Obama's May 19 speech follows and is available at <http://geneva.usmission.gov/2011/06/03/item-3-promotion-of-human-rights/>.

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Two weeks ago, in a speech about the recent changes throughout the Middle East and Northern Africa, President Obama reiterated the support of the United States for human rights and fundamental freedoms, including free speech, the freedom of peaceful assembly, freedom of religion, equality for men and women under the rule of law, and the right to choose leaders. President Obama also reaffirmed that these principles are universal rights—to be enjoyed by all persons, regardless of where they live.

Indeed, the events of the last six months reinforce how important respect for human rights is to the stability of any society. Societies held together by fear and repression may offer the illusion of stability for a time, but they are built upon fault lines that will eventually tear asunder. There can be no stability where peaceful protestors are met with violence and repression from their governments. Nor can there be stability when opposition leaders and human rights defenders are arbitrarily imprisoned. In order to resolve legitimate grievances and address legitimate aspirations, there must be an opportunity to engage in dialogue with the government, and there cannot be a real dialogue when parts of the peaceful opposition are in jail.

The protection and promotion of human rights, while intrinsically important, also encourage long-term stability by ensuring free and fair elections, a vibrant civil society,

accountable and effective democratic institutions, and responsible regional leadership. Respect for human rights also provides space for the kinds of political and economic reforms that help meet the legitimate aspirations of ordinary people—by increasing transparency and accountability in government, and by enabling the economic growth and broad-based prosperity that are necessary to democratic transition.

It is essential that human rights protections be extended to all members of society. We too often see situations where some individuals, instead of receiving protection from their governments, become the targets of violence. We deplore all instances in which people are subjected to violence due to such factors as race, gender, religious beliefs, ethnicity, disability, health status or sexual orientation. We call on all governments to vigorously defend the human rights of all persons.

President Obama made it clear that support for these universal principles is not a secondary interest for the United States. Rather, it is a top priority that must be translated into concrete action. That task of translating these principles into action remains the primary work of this Council. In this body, we have the same moment of opportunity that President Obama set before the United States—the opportunity to pursue the world, not as it is, but as it should be.

It is in this spirit that we look forward to working with other Members to advance the Council's mandate—"promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind, and in a fair and equal manner."

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On November 7, 2011, Secretary Clinton reinforced President Obama's message of support for people around the world exercising their universal and fundamental human rights in a speech at the National Democratic Institute ("NDI"). Secretary Clinton's speech is excerpted below and available in full at www.state.gov/secretary/rm/2011/11/176750.htm.

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... Do we really believe that democratic change in the Middle East and North Africa is in America's interest? That is a totally fair question. After all, transitions are filled with uncertainty. They can be chaotic, unstable, even violent. And, even if they succeed, they are rarely linear, quick, or easy.

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And yet, as President Obama said at the State Department in May, "It will be the policy of the United States to promote reform across the region and to support transitions to democracy." We believe that real democratic change in the Middle East and North Africa is in the national interest of the United States. And here's why.

We begin by rejecting the false choice between progress and stability. For years, dictators told their people they had to accept the autocrats they knew to avoid the extremists they feared. And too often, we accepted that narrative ourselves. Now, America did push for reform, but often not hard enough or publicly enough. And today, we recognize that the real choice is between reform and unrest.

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...[O]pening political systems, societies, and economies is not simply a matter of idealism. It is a strategic necessity. But we are not simply acting in our self-interest. Americans believe that the desire for dignity and self-determination is universal—and we do try to act on that belief around the world. Americans have fought and died for these ideals. And when freedom gains ground anywhere, Americans are inspired.

So the risks posed by transitions will not keep us from pursuing positive change. But they do raise the stakes for getting it right. Free, fair, and meaningful elections are essential—but they are not enough if they bring new autocrats to power or disenfranchise minorities. And any democracy that does not include half its population—its women—is a contradiction in terms. Durable democracies depend on strong civil societies, respect for the rule of law, independent institutions, free expression, and a free press. ...

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Fundamentally, there is a right side of history. And we want to be on it. And—without exception—we want our partners in the region to reform so that they are on it as well. Now, we don't expect countries to do this overnight, but without reforms, we are convinced their challenges will only grow. So it is in their interest to begin now.

These questions about our interests and consistency merge in a third difficult question: How will America respond if and when democracy brings to power people and parties we disagree with?

We hear these questions most often when it comes to Islamist religious parties. Now, of course, I hasten to add that not all Islamists are alike. Turkey and Iran are both governed by parties with religious roots, but their models and behavior are radically different. There are plenty of political parties with religious affiliations—Hindu, Christian, Jewish, Muslim—that respect the rules of democratic politics. The suggestion that faithful Muslims cannot thrive in a democracy is insulting, dangerous, and wrong. They do it in this country every day.

Now, reasonable people can disagree on a lot, but there are things that all parties, religious and secular, must get right—not just for us to trust them, but most importantly for the people of the region and of the countries themselves to trust them to protect their hard-won rights.

Parties committed to democracy must reject violence; they must abide by the rule of law and respect the freedoms of speech, religion, association, and assembly; they must respect the rights of women and minorities; they must let go of power if defeated at the polls; and in a region with deep divisions within and between religions, they cannot be the spark that starts a conflagration. In other words, what parties call themselves is less important to us than what they actually do. We applaud NDI for its work to arrive at a model code of conduct for political parties across the political spectrum and around the globe. We need to reinforce these norms and to hold people accountable for following them.

In Tunisia, an Islamist party has just won a plurality of the votes in an open, competitive election. Its leaders have promised to embrace freedom of religion and full rights for women. To write a constitution and govern, they will have to persuade secular parties to work with them. And as they do, America will work with them, too, because we share the desire to see a Tunisian

democracy emerge that delivers for its citizens and because America respects the right of the Tunisian people to choose their own leaders.

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And that brings me to my next question: What is America's role in the Arab Spring? These revolutions are not ours. They are not by us, for us, or against us, but we do have a role. We have the resources, capabilities, and expertise to support those who seek peaceful, meaningful, democratic reform. And with so much that can go wrong, and so much that can go right, support for emerging Arab democracies is an investment we cannot afford not to make.

Now, of course, we have to be smart in how we go about it. For example, as tens of millions of young people enter the job market each year, we recognize that the Arab political awakening must also deliver an economic awakening. ...

We also have real expertise to offer as a democracy, including the wisdom that NDI has gleaned from decades of working around the globe to support democratic transitions. Democracies, after all, aren't born knowing how to run themselves.

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The United States does not fund political candidates or political parties. We do offer training to parties and candidates committed to democracy. We do not try to shift outcomes or impose an American model. We do support election commissions, as well as nongovernmental election monitors, to ensure free and fair balloting. We help watchdog groups learn their trade. We help groups find the tools to exercise their rights to free expression and assembly, online and off. And of course we support civil society, the lifeblood of democratic politics.

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In Tunisia, Egypt, and Libya, we are working to help citizens safeguard the principles of democracy. That means supporting the forces of reconciliation rather than retribution. It means defending freedom of expression when bloggers are arrested for criticizing public officials. It means standing up for tolerance when state-run television fans sectarian tensions. And it means that when unelected authorities say they want to be out of the business of governing, we will look to them to lay out a clear roadmap and urge them to abide by it.

Where countries are making gradual reforms, we have frank conversations and urge them to move faster. It's good to hold multi-party elections and allow women to take part. It's better when those elections are meaningful and parliaments have real powers to improve people's lives. Change needs to be tangible and real. When autocrats tell us the transition to democracy will take time, we answer, "Well, then let's get started."

And those leaders trying to hold back the future at the point of a gun should know their days are numbered. ...

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This brings me to my last and perhaps most important point of all. For all the hard questions I've asked and tried to answer on behalf of the United States, the most consequential questions of all are those the people and leaders of the region will have to answer for themselves. Because ultimately, it is up to them. It is up to them to resist the calls of demagogues, to build

coalitions, to keep faith in the system even when they lose at the polls, and to protect the principles and institutions that ultimately will protect them. Every democracy has to guard against those who would hijack its freedoms for ignoble ends. Our founders and every generation since have fought to prevent that from happening here. The founding fathers and mothers of Arab revolutions must do the same. No one bears a greater responsibility for what happens next.

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N. FREEDOM OF ASSEMBLY AND ASSOCIATION

In June, at the 17th Session of the Human Rights Council, the United States joined in a decision to convene a panel discussion at the 18th session on “promotion and protection of human rights in the context of peaceful protests.” U.N. Doc. No. A/HRC/RES/17/120. The panel was held at the 18th session in September. At that session, Ambassador Donahoe delivered a statement for the United States delegation urging governments to protect the right to peaceful protests:

As we have witnessed the dramatic events unfolding in parts of North Africa and the Middle East, we again call upon governments to promote and protect human rights in the context of peaceful protests—thus honoring obligations that are clearly reaffirmed as universal in the [Vienna Declaration and Program of Action]. We are deeply troubled by the continued use of violence by some governments to quash universal rights to freedom of expression and peaceful assembly. We strongly condemn brutal methods of silencing dissent, which include shooting unarmed peaceful demonstrators and the use of torture. We encourage all states to renew their commitments to upholding the human rights and fundamental freedoms of all people.

Ambassador Donahoe’s statement is available in full at
<http://geneva.usmission.gov/2011/09/27/vdpa-item18/>.

O. HUMAN RIGHTS AND COUNTERTERRORISM

On March 7, 2011, the United States Delegation to the 16th Session of the Human Rights Council delivered a statement in the interactive dialogue with the special rapporteur for torture and the special rapporteur for the protection of human rights while countering terrorism. The excerpts below from the U.S. statement, which is available in full at <http://geneva.usmission.gov/2011/03/07/interactive-dialogue-on-torture-and-protection-of-human-rights-while-countering-terrorism/>, address the “Best Practices” recommended by the special rapporteur for the protection of human rights while countering terrorism.

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We would also like to thank Special Rapporteur Scheinin for his most recent and final report on the promotion and protection of human rights and fundamental freedoms while countering terrorism. We thank him for his tireless work to promote and protect human rights, not only in his tenure as the first Special Rapporteur to hold this post, but throughout his career as well.

As the Special Rapporteur's work illustrates, countering terrorism is a global challenge, which calls for states to be vigilant and creative, receptive to new ideas, and diligent in ensuring that measures taken to prevent and combat terrorism comply with their obligations under applicable international law.

The Special Rapporteur's report suggests ten areas of best practice. As the Special Rapporteur notes, recommendations for best practices are not legal obligations and thus may go beyond what is required by international law or practiced by most states. Furthermore, in this most challenging of areas, no one approach or singular set of practices will necessarily apply in all situations. We agree with the Special Rapporteur's assessment that Member States must consider best practices in a manner that is consonant with the fundamental principles of their various legal systems. As such, the practices suggested by the Special Rapporteur should not be considered as the sole means by which states can effectively counter terrorism while respecting human rights. We thank the Special Rapporteur for his devotion to upholding the human rights of all people, including victims of terrorism, and extend to him our best wishes as his particular mandate comes to a close.

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Cross References

Suspending entry into the U.S. of human rights abusers, **Chapter 1.C.4.**

Extradition of fugitive alleging fear of torture, **Chapter 3.A.3.**

Trafficking in persons, **Chapter 3.B.3.**

International, hybrid, and other tribunals, **Chapter 3.C.**

U.S. objections to Pakistan's reservations to ICCPR and CAT, **Chapter 4.A.**

Alien Tort Statute and Torture Victim Protection Act, **Chapter 5.B.**

Guidelines for multinational enterprises relating to conflict minerals, **Chapter 11.F.2.**

Climate change, **Chapter 13.A.1.**

U.S. sanctions regarding Iran and human rights, **Chapter 16.A.2.b.(2)(iii)**

U.S. sanctions concerning threats to democratic processes, **Chapter 16.A.6.**

Israeli-Palestinian conflict, **Chapter 17.A.**

Conflict with al-Qaida and operation against Usama bin Laden, **Chapter 18.A.1.a.(2)**

International humanitarian law, **Chapter 18.A.1.c.**

Detainees at Guantanamo and in Afghanistan, **Chapter 18.A.3.**

Chapter 7

International Organizations

A. UN REFORM

On April 6, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, addressed the State and Foreign Operations Subcommittee of the Appropriations Committee of the U.S. House of Representatives on the ways in which U.S. participation in the UN advances U.S. national interests and the ongoing efforts to reform the UN.

Ambassador Rice's statement is excerpted below and available in full at

<http://usun.state.gov/briefing/statements/2011/160058.htm>. On the same day, the State Department also issued a fact sheet on advancing U.S. interests at the United Nations that elaborated on many of the points in Ambassador Rice's statement below. The fact sheet is available at <http://usun.state.gov/briefing/statements/2011/160107.htm>.

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Internal Oversight Services and an improved ethics framework including protection for whistleblowers.

Third, we are pushing for a more mobile, meritocratic UN civilian workforce that incentivizes service in tough field assignments, that rewards top performers, and removes dead wood.

Fourth, we are improving protection of civilians by combating sexual violence in conflict zones, demanding accountability for war crimes, and strengthening UN field missions.

Fifth, we are insisting on reasonable, achievable mandates for peacekeeping missions. Not a single new UN peacekeeping operation has been created in the last two years, and in 2010, for the first time in six consecutive years, we closed missions and reduced the UN peacekeeping budget. ... Our leadership at the UN makes us more secure in at least five fundamental ways.

First, the UN prevents conflict and keeps nations from slipping back into war. More than 120,000 military, police, and civilian peacekeepers are now deployed in 14 operations, in places such as Haiti, Sudan, and Liberia. Just 98 of them are Americans in uniform. UN missions in Iraq and Afghanistan are promoting stability so that American troops can come home faster. This is indeed burden-sharing at its best.

Second, the UN helps halt the proliferation of nuclear weapons. Over the past two years, the United States led efforts that imposed the toughest Security Council sanctions to date on Iran and North Korea.

Third, the UN helps isolate terrorists and human rights abusers by sanctioning individuals and companies associated with terrorism, atrocities, and cross-border crime.

Fourth, UN humanitarian and development agencies often go where nobody else will to provide desperately needed assistance. UN agencies deliver food, water, and medicine to those who need it most in Darfur, Pakistan, and elsewhere.

Fifth, UN political efforts help promote universal values that Americans hold dear, including human rights, democracy, and equality—whether it’s spotlighting abuses in Iran, North Korea, and Burma or offering support to interim governments in Egypt and Tunisia.

Let me turn now briefly to our efforts to reform the United Nations and improve its management practices. Our agenda broadly speaking focuses on seven priorities.

First, UN managers must enforce greater budget discipline. Secretary-General Ban Ki-moon recently instructed senior managers to cut 3 percent from current budget levels—the first proposed reduction compared to the previous year of spending in ten years.

Second, we continue to demand a culture of transparency and accountability for resources and results. We aggressively promote a strengthened, independent Office of

Sixth, we are working to restructure the UN’s administrative and logistical support systems for peacekeeping missions to make them more efficient, cost-effective, and responsive to realities in the field.

And finally, we are pressing the UN to finish overhauling the way it does day-to-day business, including upgrading its IT platforms, procurement practices, and accounting procedures.

But the UN clearly must do more to live up to its founding principles. We have taken the Human Rights Council in a better direction, including by creating a new Special Rapporteur on Iran. But much more still needs to be done. The Council must deal with human rights emergencies wherever they occur, and its membership should reflect those who respect human rights, not abuse them.

We also continue to fight for fair and normal treatment for Israel throughout the UN system. The tough issues between Israelis and Palestinians can only be resolved by direct negotiations between the parties, not in New York and that is why we vetoed a Security Council resolution in February that risked hardening both sides’ positions. We consistently oppose anti-Israel resolutions in the Human Rights Council, the General Assembly, and elsewhere.

It goes without saying that the UN is very far from perfect. But it delivers real results for every American by advancing U.S. security through genuine burden-sharing. That burden-sharing is more important than ever at a time when threats don’t stop at borders, when Americans are hurting and cutting back, and when American troops are still in harm’s way.

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B. PALESTINIAN MEMBERSHIP EFFORTS IN THE UN SYSTEM

On October 31, 2011, the General Conference of the UN Educational, Scientific and Cultural Organization (“UNESCO”) voted to admit “Palestine” as a member. The vote was 107 in favor, 14 against, with 52 abstentions. The United States voted no, with U.S. Ambassador to UNESCO David Killian providing the following explanation, available at www.state.gov/p/io/rm/2011/176398.htm:

...[W]e recognize that this action today will complicate our ability to support UNESCO’s programs. There are other ways of promoting the cause of the Palestinian people that would not have involved seeking premature membership at UNESCO. We sincerely regret that the strenuous and well-intentioned efforts of many delegations to avoid this result fell short. The United States has been very clear about the need for a two-state

solution to the Israeli-Palestinian conflict. But the only path to the Palestinian state that we all seek is through direct negotiations. There are no short cuts and we believe efforts such as the one we have witnessed today are counter-productive.

U.S. opposition to Palestinian admission to UNESCO was further explained in the Department of State's October 31, 2011 Press Statement, excerpted below and available at www.state.gov/r/pa/prs/ps/2011/10/176418.htm.

* * * *

Today's vote by the member states of UNESCO to admit Palestine as a member is regrettable, premature, and undermines our shared goal of a comprehensive, just, and lasting peace in the Middle East. The United States remains steadfast in its support for the establishment of an independent and sovereign Palestinian state, but such a state can only be realized through direct negotiations between the Israelis and Palestinians.

The United States also remains strongly committed to robust multilateral engagement across the UN system. However, Palestinian membership as a state in UNESCO triggers longstanding legislative restrictions which will compel the United States to refrain from making contributions to UNESCO.

U.S. engagement with UNESCO serves a wide range of our national interests on education, science, culture, and communications issues. The United States will maintain its membership in and commitment to UNESCO and we will consult with Congress to ensure that U.S. interests and influence are preserved.

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As mentioned in the press statement above, Palestinian membership as a state in UNESCO implicated longstanding legislative restrictions on U.S. contributions. In view of Palestinian membership in UNESCO and this legislation, the United States has not made further voluntary and assessed contributions to UNESCO.

By way of background, section 414(a) of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. 101-246 (1990) provides that "No funds authorized to be appropriated by this Act or any other Act shall be available for the United Nations or any specialized agency thereof which accords the Palestine Liberation Organization the same standing as member states." And section 410 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. 103-236 (1994) provides that "The United States shall not make any voluntary or assessed contribution" to the United Nations or any affiliated organization of the United Nations which "grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood ...during any period in which such membership is effective."

The Palestinians also sought membership in the United Nations in 2011, submitting an application for membership to the Secretary-General of the United Nations in September. The Security Council's Committee on the Admission of New Members

considered the application and submitted a report to the Council in November. U.N. Doc. S/2011/705. No further action was taken in the Security Council.

C. INTERNATIONAL LAW COMMISSION

In October 2011, the UN General Assembly's Sixth Committee reviewed the Report of the International Law Commission on the work of its 63rd session. Mark Simonoff, Counselor for the United States Mission to the United Nations, delivered remarks in the Sixth Committee on the ILC's work on October 26, 2011. Mr. Simonoff's remarks appear below and are available at <http://usun.state.gov/briefing/statements/2011/176835.htm>.

* * * *

Thank you, Mr. Chairman. My government appreciates your efforts in guiding the work of this Committee and welcomes the opportunity to submit a few observations on topics considered by the International Law Commission at its 63rd Session.

The United States recognizes that universal respect for international law is essential to orderly and peaceful relations among States and commends the International Law Commission on its contributions to the progressive development and codification of international law. We would like to convey our special thanks to the Chairman of the Commission, Mr. Maurice Kamto for his fine stewardship. We would also like to congratulate Ms. Concepcion Escobar Hernandez and Mr. Mohammad Bello Adoke on their election to the Commission. We wish to thank the Special Rapporteurs for the topics discussed at the Commission's past session for the manner in which they have diligently guided the Commission on important—and complex—topics. We also would like to thank all of the Commissioners who have served during this past quinquennium for their outstanding work—over the last five years, the Commission has completed a number of longstanding projects and begun work on several important new topics. We thank all of the Commissioners for their outstanding service and the United States looks forward to continuing to work closely and constructively with the new Commission that will be elected next month.

We are also pleased to recall that the Commission recognized its sixtieth anniversary during this past quinquennium in 2008. As noted by several ILC Commissioners and government representatives during the ILC's sixtieth anniversary commemorative conference, the work of the Commission benefits from a strong interactive relationship with states and international organizations. In that regard, we are pleased that the Commission has in chapter III of its report requested views from governments on several of the ongoing topics on issues of particular interest, we plan to provide thoughts on these issues during this Sixth Committee session, and hope to be able to provide additional material in the months ahead and as consideration of these topics continues.

Mr. Chairman, I will comment today on some of the issues connected with the first cluster of items on the Committee's agenda.

New Topic Proposals

We appreciate the Commission's request for state views on the new topics that the Commission has added to its long term program.

First, with respect to the topic “Formation and Evidence of Customary International Law,” the United States extends its compliments to Sir Michael Wood for his excellent paper on the topic and we are supportive of adding this topic to the Commission’s long-term program. The paper sets forth an excellent road map for how the Commission might tackle this issue and also demonstrates that there are still many unsettled questions in this area that would benefit from the attention of states and the Commission. In our view, the paper insightfully touches on a number of important issues that merit additional thinking, such as the sorts of acts that count as state practice, the relationship between state practice and *opinio juris*, and the role that treaties play in the formation of customary law. We also think it would be particularly useful to collect and study the approaches of national courts or other municipal organs to customary law formation questions. Finally, we echo the paper’s conclusion that flexibility remains an essential feature in the formation of customary law and therefore it is critically important that the results of the Commission’s work not be overly prescriptive.

As suggested in the proposal, we think an appropriate outcome could be a series of propositions or practice pointers, with commentaries.

With respect to the topic “Protection of the Atmosphere,” we thank Commissioner Murase for his work in preparing the proposal. The United States supports strong international protection of the atmosphere. The United States is a party to many treaties governing air pollution, and one of this Administration’s first actions in the international environmental arena was to push for a global treaty on mercury. Additionally, there are a number of treaties, regional and global, that address specific issues related to air pollution and the effects of human emissions. Given that the current structure of law in this area is treaty-based, focused, and relatively effective, and given the existence of ongoing negotiations by States that seek to address evolving and very complex circumstances, we think it best not to attempt to codify rules in this area at this time.

With respect to the topic “Provisional Application of Treaties,” the United States compliments Professor Gaja on his proposal to examine this topic. Professor Gaja has highlighted an interesting divergence of views on the question of whether provisional application should be understood as imposing an international legal obligation. He notes that recent arbitral panels have supported the view that provisional application is a matter of legal obligation, not merely a signal of a State’s non-legally-binding intent to comply with certain provisionally applied portions of a treaty. The United States looks forward to studying the material developed by Professor Gaja’s work. With regard to the issue of whether States should give notice prior to terminating provisional application, the United States urges caution in putting forward any proposed rule that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties regarding a State’s ability to terminate provisional application of a treaty. Finally, we think a decision on the final form that this project should take is best left to a later date.

As regards the proposed new topic, the “Fair and Equitable Treatment Standard in International Investment Law,” we thank Commissioner Vasciannie for his work on the proposal thus far. The Commission has identified an interesting topic that could benefit from further study and that could lead to the identification and inventory of different formulations of this standard in numerous investment treaties. We note that other international organizations, including the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), have previously looked into this question in

depth and their work may prove to be a useful point of departure and reference for any work the Commission pursues on this topic.

We caution that, in light of the different formulations that the standard embodies in the various investment treaties, we think it will be important for the Commission to avoid efforts to restate or interpret the intentions of the treaty parties that have adopted these standards and to instead concentrate its efforts on describing the different formulations that treaty parties select when referring to this standard. Toward this end, we recommend that as the Commission carries out its inquiry into this standard, it not necessarily limit itself to the issues currently identified. Moreover, as the Commission notes, much like Most Favored Nation clauses, the fair and equitable treatment standards embodied in treaties tend to differ considerably in their structure, scope and language and thus resist a uniform approach. As such, we welcome the Commission's acknowledgement that the mere inclusion of this standard in over three thousand investment treaties does not, in and of itself, demonstrate that the fair and equitable treatment standard is a part of customary international law. Finally, given the nature of these provisions, the Commission likely will not be able to develop uniform rules or a definitive statement on the meaning of the standard. That said, we believe it is useful for the Commission to survey and describe current state practice and jurisprudence, which can serve as a useful resource for governments and practitioners who have an interest in this area.

We also thank Commissioner Jacobsson for her work in preparing a proposal on the topic "Protection of the Environment in Relation to Armed Conflicts." We appreciate the work of Commissioner Jacobsson and support the Commission's efforts to identify ways to strengthen international humanitarian law. At the same time, the proposed topic implicates many subject areas, including—as the Commission's report highlights—international humanitarian law, international criminal law, international environmental law and human rights law. Given that the topic is very broad in scope, there are questions as to whether the topic is sufficiently focused so as to benefit from the expertise of the Commission. We also note that the Commission's proposal identifies a previous lack of state support for pursuing this topic—a conclusion the International Committee of the Red Cross also reached earlier this year when it found that a number of States did not consider further work in this area to be a priority at this time.

Reservations to Treaties

The United States congratulates the Commission on its work to conclude the Guide to Practice. Professor Pellet has devoted countless hours of his time to this project and he should be commended for bringing this work to a conclusion after so many years. Our understanding is that the Guide to Practice will not be up for formal consideration until next year. Nevertheless, we think it is important to emphasize that state practice on the consequences of an invalid reservation remains quite varied and, as a result, section 4.5.3—one of the more controversial elements of the Guide—should not be understood to reflect the consistent practice on the part of States. Indeed, the United States continues to find the approach articulated in that section difficult to reconcile with the fundamental principle of treaty law that a state should only be bound to the extent it voluntarily undertakes a treaty obligation. We are still in the process of examining the final provisions of the Guide as well as its extensive commentary and look forward to addressing it more comprehensively when the Sixth Committee formally considers it next year.

The United States also notes the Commission's recommendations that the General Assembly consider establishing an "observatory" on treaty reservations within the Sixth Committee, as well as a "reservations assistance mechanism." The observatory presumably

would be similar to that established within the Council of Europe's Committee of Legal Advisers on Public International Law. The United States has participated actively as an observer in that process and believes that it has been quite valuable. Based on that experience, we think additional focus on such issues in the Sixth Committee and in other regional or subregional settings can be useful. Coordination would of course be desirable to the extent possible to avoid unnecessary overlap in the work of such observatories.

With regard to the "reservations assistance mechanism," the United States is interested to learn more about this proposal, including the status of the proposals emerging from the mechanism. In general, we question whether an independent mechanism, consisting of a limited number of experts that would meet to consider problems related to reservations, is appropriate to inject into a process that fundamentally is to take place between and among states. Further, we are concerned about any implication that the proposals resulting from the mechanism could in any way be seen as compulsory on the states requesting assistance.

Responsibility of International Organizations

I now turn to the newly adopted draft articles on the Responsibility of International Organizations. The United States wishes to thank Professor Gaja, the Special Rapporteur on this topic, for his work in undertaking and overseeing this topic and bringing it to completion. Without doubt, the draft Articles are a significant contribution to international legal thinking. We also wish to express our gratitude for the valuable views—many of which we shared—provided by the United Nations Secretariat and other international organizations, such as the International Monetary Fund and the World Bank, which have contributed and will continue to contribute to thinking on this topic.

We would like at this point to limit ourselves to making three general comments.

First, we are pleased that the Commission has included a General Commentary introducing the draft Articles, which indicates the scarcity of practice in this area and reflects that much contained in these draft articles falls into the category of progressive development rather than codification of the law. Disagreements do exist about whether many of these articles currently state the law in this area. Hence, we agree with the Commission's assessment that the provisions of the present draft articles do not have the same authority as the corresponding provisions on State responsibility. That assessment must be kept in mind when considering the cross-references from these draft articles to the articles and commentary on State responsibility, and whether the draft articles sufficiently reflect the differences between international organizations and States.

Second, we also agree with the General Commentary that there exists great diversity among international organizations, which of course operate at the global, regional, sub-regional, and even bilateral levels, with important structural differences, and an extraordinary range of functions, powers, and capabilities. Given these differences, the principles described in some of the draft articles likely do not apply to international organizations in the same way that they apply to States, for example those articles addressing countermeasures and self-defense. Indeed, for all of the draft articles, the principle underlying the *lex specialis* rule set forth in Article 64 is of extraordinary importance. In connection with this principle, it may be necessary to give further thought to the differences in the way principles of responsibility may operate as among an international organization and its members, as opposed to how those principles operate in other settings.

Third, we support the recommendation of the Commission that any discussion of whether the draft articles should be transformed into a Convention should be deferred. Doing so would

allow time for the development of further practice of international organizations relevant to the draft Articles.

We appreciate the significant work that the Commission has undertaken on this topic.

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State Department Legal Adviser Harold Hongju Koh delivered the second part of the U.S. comments on the ILC's work on October 27, 2011. His remarks follow and are available at <http://usun.state.gov/briefing/statements/2011/176935.htm>.

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Mr. Chairman, once again, I would like to thank the Chairman of the Commission, Mr. Maurice Kamto, for his introduction of the Commission's report. I appreciate the opportunity to comment on the topics that are currently before the Committee.

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Effects of Armed Conflicts on Treaties

First of all, I would like to begin by congratulating the Commission on approving the draft articles and commentaries on the effects of armed conflict on treaties. We are pleased with the Commission's effort this past year to improve the draft articles. I would also like to commend Mr. Lucius Caflisch on his efforts to steer this project to a successful conclusion. In our view, the draft articles preserve the reasonable continuity of treaty obligations during armed conflict, takes into account particular military necessities, and provides practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict. We are pleased that they continue to reflect this approach.

We have raised certain concerns in the past about the definition of "armed conflict" in draft article 2(b). Defining the term "armed conflict" is likely to be confusing and counterproductive, given the wide variety of views about the definition. The better approach is to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the Geneva Conventions (i.e., international and non-international armed conflicts). Unlike the Tadic formulation, which is a useful reference point but not appropriate in all contexts, common articles 2 and 3 of the Geneva Conventions enjoy nearly universal acceptance among states. Further, with regard to draft Article 15, we do not believe it should be interpreted to suggest that illegal uses of force that fall short of aggression would necessarily be exempt from this provision.

With regard to the Commission's recommendation that the General Assembly consider, at a later stage, the elaboration of a convention on the basis of these draft articles, we believe that the draft articles are best used as guidance for individual States when determining the effect of specific armed conflicts on their treaty relations. Further, in light of our views regarding Articles 2 and 15, we do not support efforts to elaborate a convention on this topic. The United States

believes that the General Assembly should take note of the work on this topic and encourage States to use the articles in context-specific situations.

Expulsion of Aliens

The United States appreciates the continued efforts of Special Rapporteur Kamto on the topic of Expulsion of Aliens. The issues addressed by the Special Rapporteur are complicated ones and we encourage the Special Rapporteur and other members of the Commission, as well as other States, to review carefully the revised draft articles.

The draft articles should recognize protections for persons, but should also avoid unduly restraining the sovereign rights enjoyed by States to control admission to their territories and to enforce their immigration laws. In balancing these two values, the methodology used by the Commission is extremely important. The principal focus should be on the well-settled principles of law reflected in the texts of broadly-ratified global human rights conventions, rather than crafting new rights specific to the expulsion context or importing concepts from regional jurisprudence (e.g., from the European Commission and Court) in which all States are not participating. In particular, we have concerns about both the incorporation of non-refoulement obligations into numerous provisions of the draft articles and the expansion of non-refoulement obligations far beyond situations prescribed under well-settled principles of international law. By way of example, under draft article E1, non-refoulement would extend to a situation where “the alien subject to expulsion is at risk of ...inhuman and degrading treatment in [the receiving] State.” This provision would go beyond the express non-refoulement protection regarding torture contained in Article 3 of the CAT and beyond the non-refoulement protection regarding a well-founded fear of persecution contained in the Refugee Convention and Protocol.

We also believe that extradition should be excluded from the scope of the draft articles; extradition is not the same thing as expulsion, for it entails the transfer of an individual—whether it is the transfer of an alien or a national—for a specific law enforcement purpose. Many of the proposals in these draft articles are not consistent with the settled practices and obligations of States under multilateral and bilateral extradition treaty regimes, including the new draft articles on disguised expulsion and extradition disguised as expulsion.

We also have concerns about the various references to language in the reports regarding the rights of persons after they have been expelled. In our view, as a general matter and consistent with the framework adopted in international human rights treaties, these draft articles should apply to individuals within the territory of a State who are subject to a State’s jurisdiction. Failure to limit the obligations to treatment of persons prior to their being expelled would place States in an impossible situation of being responsible for conduct by third parties.

We thank Special Rapporteur Kamto for his diligent and dedicated work on the topic of Expulsion of Aliens, which is of critical importance to both sending and receiving states, and we look forward to continued collaboration on this subject.

Protection of Persons in the Event of Disasters

The United States commends the Commission for its progress in this important topic, including its work on draft articles 6 through 11, and congratulates the special rapporteur, Mr. Eduardo Valencia-Ospina, for his diligent stewardship of this topic.

We commend the Special Rapporteur for recognizing the core role that humanitarian principles of humanity, neutrality, impartiality, and non-discrimination play in the coordination and implementation of humanitarian assistance in disaster response. We would encourage the Special Rapporteur to continue to consider, in his ongoing work, the possible ways in which these principles relate to and shape the context of disaster relief in the present project.

We appreciate the Special Rapporteur's ongoing efforts to ensure that the duty of States to cooperate set forth in draft article 5 is understood in the context of the principle that the affected State has the primary responsibility for protection of persons and provision of humanitarian assistance on its territory. We also appreciate the fact that the Special Rapporteur has included in draft article 9 language that the affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The report indicates debate among Commission members regarding whether the affected State has a duty in certain circumstances to seek external assistance and not to withhold assistance arbitrarily. Also under continuing consideration under Draft Article 12 is the extent to which third actors such as states, international organizations and NGOs have a "right" to offer assistance or a duty to cooperate in providing assistance when requested. Issues surrounding this debate are likely to attract a wide range of diverging views, and it may be that -- in the interests of facilitating the development a product that is of the most practical use to the international community -- the Commission should structure its work in a way that avoids the need for a definitive pronouncement on these issues.

In general, we believe that the current draft articles make important progress in a number of areas. We continue to believe that the Commission could contribute greatly to State efforts to plan and prepare for disaster relief efforts through a focus less on rights and more on providing practical guidance to countries in need of, or providing, disaster relief. At the same time, the United States strongly supports international cooperation and collaboration in providing disaster relief.

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D. RESUMPTION OF PARTICIPATION BY HONDURAS IN THE OAS

In 2011, Honduras resumed participation as a member of the Organization of American States. See *Digest 2009* at 267-68 for a discussion of the resolution suspending Honduras from participation in the OAS in 2009 after a coup resulted in the overthrow of the democratically-elected president. The United States welcomed the return of Honduras to the OAS in a statement issued by Secretary of State Hillary Rodham Clinton, set forth below and available at www.state.gov/secretary/rm/2011/05/164096.htm.

* * * *

The United States welcomes the agreement reached yesterday in Colombia by Honduran President Porfirio Lobo and former Honduran President Jose Manuel Zelaya. Thanks to the help of the Colombian and Venezuelan governments, this agreement paves the way for the reintegration of Honduras to the Organization of American States (OAS) and gives Honduras the opportunity to pursue national reconciliation and end its isolation from the international community.

The United States commends the Governments of Colombia and Venezuela for the initiatives and efforts they undertook that led to this agreement. The tireless commitment by

other Central American countries and the Dominican Republic helped this initiative reach a successful end that will now give Honduras the opportunity to return to the OAS. We now look forward to prompt action by member countries of the OAS to allow Honduras to resume its participation.

Today is a great day for the people of Honduras and for all Hondurans around the world.

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The United States provided the following explanation of its vote in favor of the resolution regarding the participation of Honduras in the OAS, which was adopted at the 41st Special Session of the General Assembly of the OAS. OAS Doc. No. AG/RES. 1 (XLI-E/11)

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The United States of America fully supports Resolution AG/RES. 1 (XLI-E/11), which lifts the suspension of the Republic of Honduras from the exercise of its right to participate in the Organization of American States. The United States welcomes the return of the Republic of Honduras to full participation in the Organization.

The United States of America supports the invocation in the Resolution of Article 22 of the Inter-American Democratic Charter, and notes that Article 9 of the Charter of the Organization of American States is the source of authority for the suspension of the right of participation of a Member State when its democratically constituted government has been overthrown by force, and for the lifting of such suspension.

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Cross References

Human Rights Council, **Chapter 6.A.3.**

Immunities of international organizations, **Chapter 10.E.**

Outer space, **Chapter 12.B.**

Mid-east peace process, **Chapter 17.A.**

Chapter 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

See Chapter 7.C.

B. NAZI ERA CLAIMS

1. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*

On February 18, 2011, the United States filed a statement of interest in a case in federal district court in the Northern District of Illinois. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, No. 1:10cv1884(SDY) (N.D. Ill.). The U.S. statement, excerpted below (with footnotes and citations to the exhibits omitted), and available in full at www.state.gov/s/l/c8183.htm, advised the court that dismissal of the claims against two of the defendants, Erste Group Bank AG (“Erste Group”) and MKB Bank, would be in the foreign policy interest of the United States. The case was brought on behalf of victims of bank theft in the former territory of Hungary (or their heirs or next of kin) seeking recovery for assets taken from them by defendant banks during World War II.

The interest of the United States in the case was based on its strong support for cooperative compensation arrangements involving Holocaust claims against German and Austrian companies, in particular the German Foundation, and the Austrian General Settlement Fund (“GSF”). Those arrangements were negotiated and concluded with the intent of providing swifter compensation to victims than could be obtained in U.S. courts and also providing “legal peace” for German and Austrian companies covered by the arrangements. See *Digest 2000* at 446-60 for a discussion of the U.S.-German Agreement and the United States statement of interest seeking dismissal in the consolidated cases involving claims against German companies that was filed after the agreement with Germany originally entered into force in 2000. See *Digest 2001* at 394-406 for a discussion of the agreement with Austria and the statement of interest filed by the United States seeking dismissal of lawsuits pending against Austrian companies in 2001.

The U.S. statement of interest filed in 2011 explained that Erste Group and MKB Bank are covered by the compensation arrangements with Germany and Austria, according to the terms of those arrangements. Several exhibits were attached to the U.S. statement of interest, including two declarations by Under Secretary of State William J. Burns—one regarding Germany and one regarding Austria. The exhibits are available at www.state.gov/s/l/c8183.htm. Under Secretary Burns’ declaration regarding Germany appears below, following excerpts from the statement of interest. The declaration regarding Austria is similar. Other exhibits to the statement of interest included declarations of U.S. government officials made at the time the compensation arrangements originally went into effect in 2000.

On May 18, 2011, the court issued its decision denying all motions to dismiss as to all defendants, including Erste Group and MKB Bank. 807 F.Supp.2d 699 (2011). On August 11, 2011, the court issued another decision, denying motions for reconsideration and clarification and for certification for interlocutory appeal. 807 F.Supp.2d 699 (2011). On September 23, 2011, the United States filed a supplemental statement of interest in response to a supplemental filing by plaintiffs. At the end of 2011, the case was proceeding at the district court level.

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DISMISSAL OF THE CLAIMS AGAINST ERSTE BANK GROUP A.G. AND MKB BANK IN THIS ACTION WOULD BE IN THE FOREIGN POLICY INTEREST OF THE UNITED STATES

The German Foundation and the GSF are examples of the successful implementation of the United States Government's policy goal to obtain some measure of justice for the victims of the Holocaust within their remaining lifetimes. The United States believes that the best means to accomplish this goal is through dialogue, negotiation, and cooperation between concerned parties, foreign governments, and non-governmental organizations, rather than litigation. Although the agreements setting up the German Foundation and the GSF are not claims settlement agreements, they are nonetheless aimed at achieving legal closure for German and Austrian companies with respect to claims arising out of World War II and the Nazi era, and to facilitate the agreements, the United States agreed to support the goal of legal closure for German and Austrian companies by filing Statements of Interest in cases where claims are brought against a German or Austrian company setting forth the significant United States foreign policy interests favoring dismissal of the claims. ...

To that end, the Austrian Government and Austrian companies insisted that, as a precondition to the GSF making payments to any victims, all pending litigation in the United States involving such claims against Austrian companies would first have to be dismissed. The German Government and German companies likewise insisted in the dismissal of all pending litigation in the United States in which Nazi era and World War II claims were asserted against German companies as a precondition to allowing the German Foundation to make payments to victims.

There are at least four reasons why, at the time of the respective creations of the German Foundation and GSF, the President of the United States concluded that it would be in the United States' foreign policy interests for the funds to be the exclusive forum and remedy for all Nazi-era property claims against German and Austrian companies. These United States foreign policy interests continue to favor dismissal of Nazi-era property claims against German and Austrian companies such as Erste Group and MKB Bank.

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era (who are elderly and are dying at an accelerated rate) in their lifetimes. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation. The GSF, the Reconciliation Fund, and the German Foundation exemplify how such cooperation can lead to a positive result. The GSF and German Foundation provided benefits to more victims, and did so faster and with less

uncertainty than litigation would have. They employed more relaxed standards of proof than those applied in litigation, and afforded access to those with Nazi-era property claims against existing and defunct companies. But such comprehensive relief was only possible because of the expectation that those who participated in funding the GSF and the German Foundation would receive legal closure in exchange.

Indeed, although the agreements at issue were not “settlements” in name, the Austrian and German governments and Austrian and German companies insisted on dismissal of then-pending Nazi-era claims against them as a precondition to allowing the GSF and the German Fund to make payments to victims. It is in the enduring and high interest of the United States to vindicate these fora by supporting efforts to achieve dismissal of (i.e., legal closure for) Nazi-era claims against German and Austrian companies.

Second, establishment of the GSF and the German Fund served to strengthen the ties between the United States and our democratic allies and trading partners, Austria and Germany. One of the most important reasons the United States took such an active role in facilitating a resolution of the issues raised in this litigation is that it was asked by the German and Austrian Governments to work as a partner in helping to make the German Foundation, the Reconciliation Fund, and the GSF initiatives successful. Since 1945, the United States has sought to work with Austria and Germany to address the consequences of the Nazi era and World War II through political and governmental acts, beginning with the first compensation and restitution laws in post-war Austria that were passed during the Allied occupation. In recent years, Austrian-American and German-American cooperation on these and other issues has continued, and the joint efforts to develop the German Foundation, the Reconciliation Fund, and the GSF have helped solidify these close relationships.

Austria is an important factor to the prosperity of Europe, and particularly the new democracies of Central and Eastern Europe. Austria has worked with the United States in promoting democracy for decades, and is instrumental to the economic development of Central and Eastern Europe. As a member of the European Union, Austria has supported integration of the European Union as well as efforts to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. Our continued cooperation with Austria is important to helping achieve these United States interests. The “legal closure” that Austria sought from the United States is important to the continued success of this important foreign policy relationship.

Similarly, Germany today is a key to the security and prosperity of the broader North Atlantic community. Germany has been a partner of the United States in promoting and defending democracy for more than half a century, and is vital to both the security and economic development of Europe. Germany has been a leader in efforts to create stability in Europe through expansion of NATO to include the former communist countries of Central Europe, and through the building of bridges between NATO and Russia. Germany has also been a leader in supporting integration of the European Union, and in the effort to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. Our continued partnership with Germany is important to helping achieve these United States interests.

Third, the German Foundation, the Reconciliation Fund, and the GSF furthered the United States’ interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come.

And, fourth, the German Foundation, the GSF, and the Reconciliation Fund, are the fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era. “It is in the foreign policy interests of the United States to take steps to address the consequences of the Nazi era, to learn the lessons of, and teach the world about, this dark chapter in European history and to seek to ensure that it never happens again.” Although no amount of money will ever be enough to make up for Nazi-era atrocities, the Austrian and German governments have created compensation, restitution, and other benefit programs for Nazi-era acts that have resulted in significant payments to a large number of victims.

These United States foreign policy interests are enduring and apply to this litigation. In the words of William Burns, the current Under Secretary of State for Political Affairs:

The foreign policy interests in ‘legal peace’ for covered companies described by Secretary Albright and Deputy Secretary Eizenstat [in Exhibits 2, 3, 7, and 8] are enduring and extend beyond [Germany and Austria’s] successful implementation of [the respective agreements]. The United States’ efforts to facilitate this cooperative compensation arrangement are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, in their lifetimes, as well as to support a broad ‘legal peace’ for countries and companies subject to ongoing claims.

Similarly, Douglas Davidson, the Department of State’s Special Envoy for Holocaust Issues, states:

The United States’ view is that its long-standing, and ongoing, pursuit of cooperative compensation arrangements with [Germany, Austria] and other governments has achieved justice for the greatest numbers of Holocaust victims, survivors and heirs. Going forward, the United States is focusing its efforts in this regard on the new democracies of Central and Eastern Europe where the preponderance of Europe’s Jewish population once lived. It is important to these ongoing efforts that the United States fully perform its obligations by supporting efforts to achieve dismissal of (i.e., “legal peace” for) all claims against [Austrian and German] companies covered by the [respective agreements].

For the reasons stated by Under Secretary Burns and Special Envoy Davidson, while the United States takes no position on the underlying legal merits of the claims and defenses advanced by the parties in this case, it would be in the foreign policy interests of the United States for the claims against Erste Group Bank and MKB Bank to be dismissed on any valid legal ground(s). *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 n.14 (11th Cir.2004) (addressing a similar Statement of Interest filed by the United States and holding that “the executive’s statements of national interest in issues affecting our foreign relations are entitled to deference” (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004))).

* * * *

DECLARATION BY UNDER SECRETARY OF STATE WILLIAM J. BURNS
I, William J. Burns, hereby declare and state as follows:

1. I am the Under Secretary of State for Political Affairs, a position I have held since May 2008. Prior to my current position, I have served in a number of posts since entering the Foreign Service in 1982, including, among others Ambassador to Russia, Assistant Secretary of State for Near Eastern Affairs, and Ambassador to Jordan.
2. The United States and Germany signed an Executive Agreement on July 17, 2000, in which Germany committed to establish the Foundation, “Remembrance, Responsibility and the Future,” to compensate victims of the Nazi era, and the United States committed to take certain steps to assist Germany and German Companies in achieving “legal peace” in the United States with respect to such claims. The background of these efforts and a statement of U.S. foreign policy interests in the implementation of the Agreement are stated in the October 19, 2000 declaration of former Deputy Secretary of Treasury Stuart Eizenstat, and the October 20, 2000 statement of former Secretary of State Madeleine Albright (attached).
3. The foreign policy interests in “legal peace” for covered companies described by Secretary Albright and Deputy Secretary Eizenstat are enduring and extend beyond Germany’s successful implementation of the Agreement. The United States’ efforts to facilitate this cooperative compensation arrangement are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, in their lifetimes, as well as to support a broad “legal peace” for countries and companies subject to ongoing claims.

* * * *

2. U.S. Supreme Court case: exhaustion requirement

In May 2011, the United States submitted a brief as *amicus curiae* in the Supreme Court of the United States at the invitation of the Court. *Kingdom of Spain v. Estate of Claude Cassirer*, No. 10-786. The case was brought by the estate of the descendant of a former owner of a painting that was confiscated by Nazi Germany and later came to be owned by an agency of the Spanish government. The Spanish government and the government agency petitioned for *certiorari* after the appeals court held that the suit against them could proceed. The United States brief is available at www.justice.gov/osq/briefs/2010/2pet/6invit/2010-0786.pet.ami.inv.pdf. Excerpts below address whether there is an exhaustion requirement prior to seeking relief for expropriation in U.S. courts (with citations to the record and most footnotes omitted). See Chapter 10.A.2.b for discussion of the section of the brief addressing the applicability of the expropriation exception under the Foreign Sovereign Immunities Act (“FSIA”). The Supreme Court denied *certiorari*, allowing the appeals court ruling to stand and the case to proceed at the district court level.

* * * *

B. The FSIA’s Expropriation Exception Does Not Require Respondent To Exhaust Remedies In Spain Or Germany

The court of appeals correctly held that Section 1605(a)(3) does not mandate that a plaintiff exhaust foreign remedies before bringing suit against a foreign state or instrumentality. Section

1605(a)(3) itself says nothing about exhaustion. That is in contrast to the former Section 1605(a)(7), which required that a plaintiff suing a foreign state for state-sponsored terrorism “afford[] the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.” 28 U.S.C. 1605(a)(7)(B)(i) (2006). Congress knows how to require plaintiffs to seek other remedies before bringing suit under Section 1605(a), and it has not done so in Section 1605(a)(3).

In addition, the FSIA’s expropriation exception was enacted following this Court’s decision in *Sabbatino*, which declined to adjudicate claims to property expropriated by the Cuban government.* The FSIA’s expropriation exception provides for subject-matter jurisdiction over certain such suits—*i.e.*, it prevents a foreign entity from invoking sovereign immunity when a plaintiff alleges a taking in violation of international law and demonstrates that the foreign entity carries on the requisite commercial activity in the United States. In *Sabbatino* itself, the Court noted that Cuba had “formally provided” a system of compensation for expropriated property, although “the possibility of payment under it may well be deemed illusory.” 376 U.S. at 402; see *id.* at 402 n.4. It is unlikely that Congress intended to require the victims of expropriation abroad to exhaust foreign remedies, whether real or illusory, and yet said nothing about it in Section 1605(a)(3).

2. Petitioners invoke international law, but there is no requirement in international law that a plaintiff must exhaust local remedies for a viable expropriation claim to arise. To be sure, if a taking of property by a foreign state is for a public purpose and is not discriminatory, then the taking violates international law only if it is not accompanied by prompt, adequate, and effective compensation. 2 Restatement § 712(1)(c) & cmt. c at 196, 198. Accordingly, for those types of takings, a plaintiff may need to have pursued and been denied compensation in the foreign state for there to be a ripe taking claim at all. Cf. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985). But where, as here, the taking violated international law because it was not for a public purpose or was discriminatory, the taking claim does not depend upon a showing that the plaintiff has sought and been denied just compensation. In any event, these considerations go to whether a taking in violation of international law has occurred, and here petitioners concede that such a taking occurred. Accordingly, to the extent that these considerations bear at all on this case, they can be taken into account on remand in determining whether exhaustion should be required as a prudential matter.

* * * *

C. IRAQ CLAIMS

In May 2011, the U.S.-Iraq Claims Settlement Agreement, which was signed in 2010, entered into force. The text of the agreement is available at www.state.gov/documents/organization/166949.pdf. Also in 2011, Iraq paid the \$400 million settlement amount provided for in the agreement, triggering the obligation of the United States to espouse claims against Iraq for compensation. A June 21, 2011 State Department media note, reprinted below, announced the commencement of the claims settlement process.

* Editor’s note: See Chapter 10.A.2.b for the section of the U.S. brief that discusses *Sabbatino*.

* * * *

Efforts by the United States and Iraq to settle longstanding claims of U.S. nationals who were victims of the Saddam Hussein regime have been brought to conclusion today in accordance with the U.S.-Iraq Claims Settlement Agreement that was signed on September 2, 2010. The settlement is designed to provide fair compensation for American nationals who were prisoners of war, hostages, and human shields during the first Gulf War and U.S. servicemen who were injured in the 1987 attack on the USS Stark, and to confirm Iraq's immunity in U.S. courts in connection with such claims.

The resolution of these claims is the product of several years of hard work and careful negotiations between the governments of the United States and Iraq. It represents a significant step in Iraq's efforts to resolve outstanding claims arising from actions of the previous regime. Congressman Bruce Braley's unwavering support of the Administration's efforts to achieve resolution of the claims was instrumental throughout the process leading up to the conclusion of the Agreement and beyond.

The Department of State will now establish procedures through which eligible U.S. nationals will be able to apply for compensation for their claims. This may include the referral of some claims to the Foreign Claims Settlement Commission for adjudication. Individuals who would like more information about the claims process or to file a claim should contact the dedicated Iraq Claims hotline at 202-776-8580. Department personnel will respond to their questions and keep them informed on future developments. The Department will also contact claimants with whom it has already been in contact either directly or through counsel to make them aware of next steps.

* * * *

Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**

McKesson v. Iran, **Chapter 5.C.2. and Chapter 10.2.a.(2)**

International Law Commission, **Chapter 7.C.**

Expropriation exception to Foreign Sovereign Immunities Act, **Chapter 10.A.2.b.**

Litigation under terrorism exception to Foreign Sovereign Immunities Act, **Chapter 10.A.2.d.**

NAFTA dispute settlement, **Chapter 11.B.1.**

WTO dispute settlement, **Chapter 11.C.1.**

Request for arbitral panel under CAFTA-DR Agreement, **Chapter 11.D.2.**

Arbitration with Canada relating to compliance with Softwood Lumber Agreement,
Chapter 11.D.3.

Chapter 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

After the United States suspended operations of its embassy in Tripoli, the Republic of Turkey agreed in April 2011 to represent the United States in Libya and protect United States citizens and interests in accordance with the Vienna Convention on Diplomatic Relations. After the Turkish embassy in Tripoli suspended operations, the Republic of Hungary agreed to act as protecting power for the United States beginning in June 2011. When the United States resumed operations of its embassy in Tripoli in September 2011, Hungary ceased acting as protecting power for the United States in Libya. This was the first time that either the Government of Turkey or the Government of Hungary had acted as protecting power for the United States. Other governments which have served in this role during the last century include Switzerland (representing U.S. interests in Cuba from 1961 to the present and Iran from 1980 to the present); Sweden (representing U.S. interests in the Democratic Republic of North Korea from 1996 to the present); Belgium (representing U.S. interests in Libya from 1991-2004); Poland (representing U.S. interests in Iraq from 1991-2004). See *Digest 1989-90* at 241-42 for background on instances in which foreign governments have acted as protecting powers for the United States.

B. STATUS ISSUES

1. Recognition of South Sudan

On February 7, 2011, after a referendum in which a majority of the people of Southern Sudan voted in favor of independence, the United States announced its intention to recognize South Sudan as a sovereign, independent state. President Obama's statement on the referendum appears below. Daily Comp. Pres Docs. 2011 DCPD No. 00073, p. 1.

* * * *

On behalf of the people of the United States, I congratulate the people of Southern Sudan for a successful and inspiring referendum in which an overwhelming majority of voters chose independence. I am therefore pleased to announce the intention of the United States to formally recognize Southern Sudan as a sovereign, independent state in July 2011.

After decades of conflict, the images of millions of southern Sudanese voters deciding their own future was an inspiration to the world and another step forward in Africa's long journey toward justice and democracy. Now all parties have a responsibility to ensure that this historic moment of promise becomes a moment of lasting progress. The Comprehensive Peace Agreement must be fully implemented and outstanding disputes must be resolved peacefully. At the same time, there must be an end to attacks on civilians in Darfur and a definitive end to that conflict.

As I pledged in September when addressing Sudanese leaders, the United States will continue to support the aspirations of all Sudanese—north and south, east and west. We will work with the Governments of Sudan and Southern Sudan to ensure a smooth and peaceful transition to independence. For those who meet all of their obligations, there is a path to greater prosperity and normal relations with the United States, including examining Sudan's designation as a state sponsor of terrorism. And while the road ahead will be difficult, those who seek a future of dignity and peace can be assured that they will have a steady partner and friend in the United States.

* * * *

In July, in accordance with President Obama's stated intention above, the United States proceeded with arrangements to formally recognize South Sudan and establish diplomatic relations. The exchange of letters between President Obama and the president of the Republic of South Sudan, set forth below, described the arrangements for establishing relations between the two countries.

* * * *

THE WHITE HOUSE
WASHINGTON

July 7, 2011

His Excellency
Salva Kiir Mayardit
President of the Republic of South Sudan
Juba

Dear Mr. President:

On behalf of my government, I congratulate the people of South Sudan on their independence. I am pleased to propose the following arrangements on the basis for the establishment of diplomatic relations between the United States and the Republic of South Sudan.

First, I seek your concurrence that our diplomatic and consular services be conducted in accordance with the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, and in particular, that the status and privileges and immunities of the U.S.

Embassy and their respective members be governed by these agreements.

Second, I seek your confirmation that the Republic of South Sudan commits to fulfill the existing obligations to the United States, including existing treaty obligations, of the Republic of Sudan, as well as the Regional Assistance and Grant Agreement concluded between the United States Agency for International Development and the Government of South Sudan. As relations between our two countries progress, we are, of course, prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in United States-South Sudanese relations. I also seek your assurances that the Republic of South Sudan assumes the appropriate responsibility for the Republic of Sudan's financial obligations, including its foreign debt, as agreed between the Republic of Sudan and the Republic of South Sudan.

Third, I wish to notify you that the U.S. Consulate in Juba is to be converted into the Embassy of the United States with your concurrence. Under separate cover, we intend to provide the names of the members of the Embassy of the United States to be accredited in Juba and their family members. The United States Government welcomes the establishment by the Republic of South Sudan of diplomatic representation in the United States, and awaits a request for agrément, as well as the names of the members to be accredited to the Embassy of the Republic of South Sudan in Washington, D.C.

I look forward to receiving your concurrence, by reply to this note, to the establishment of diplomatic relations, as well as to these arrangements and to the continued development of cordial and productive relations between South Sudan and the United States of America.

Sincerely,
[signed by Barack Obama]

* * * *

Government of Southern Sudan
Office of the President

GOSS/PO/J/1.E.1

09/07/2011

The Honourable Barack H. Obama,
President of the United States of America,
The White House,
Washington, D.C.
USA

Dear Mr. President,

On behalf of the Government and people of Southern Sudan and on my own behalf, I take this opportunity to thank the Government and people of the United States of America for the prompt recognition of the Republic of South Sudan. As a result, I am pleased to confirm the following arrangements as the basis for the establishment of diplomatic relations between the Republic of South Sudan and the United States of America.

First, I concur that our diplomatic relations be conducted in accordance with the **Vienna Convention on Diplomatic Relations** and the **Vienna Convention on Consular Relations**, and in particular, that the status, privileges and immunities of the United States Embassy and Consulates and their respective members be governed by these agreements.

Second, I confirm that the Republic of South Sudan commits to fulfill the existing obligations to the United States of America, including the existing treaty obligations of the Republic of Sudan, as well as the Regional Assistance and Grant Agreement concluded between the United States Agency for International Development and the Government of Southern Sudan on May 9, 2011. As relations between our two countries progress, we will be prepared to review any such treaties to determine whether they should be revised, terminated or replaced to take into account developments in U.S.-South Sudanese relations.

Mr. President, I would also liked to assure you that the Republic of South Sudan assumes the appropriate responsibility for the Republic of Sudan's International Financial Obligations, including its Foreign Debt as resolved between the Republic of Sudan and the Republic of South Sudan in post-referendum arrangements.

Finally, we concur with your request to upgrade the United States Consulate in Juba to become the Embassy of the United States of America to the Republic of South Sudan. We have included a list of the names of members of the Embassy of South Sudan in the United States of America and their family members under separate cover. We intend to submit request for agreement as well as provide to you the names of the members of the Embassy of the Republic of South Sudan to be accredited in Washington, D.C. and their family members.

We look forward to the continued development of cordial and productive relations between the Republic of South Sudan and the United States of America.

[signed]

Gen Salva Kiir Mayardit,

First Vice President of the Republic of the Sudan and President
of the Government of Southern Sudan,
JUBA, SOUTHERN SUDAN

* * * *

On July 9, 2011, South Sudan formally declared independence based on the results of the referendum held in January 2011. On that same day, the United States recognized the Republic of South Sudan as an independent and sovereign state. President Obama's statement recognizing South Sudan as an independent and sovereign state is excerpted below. Daily Comp. Pres Docs. 2011 DCPD No. 00497, p. 1.

* * * *

I am proud to declare that the United States formally recognizes the Republic of South Sudan as a sovereign and independent state upon this day, July 9, 2011. After so much struggle by the people of South Sudan, the United States of America welcomes the birth of a new nation.

* * * *

This historic achievement is a tribute, above all, to the generations of Southern Sudanese who struggled for this day. It is also a tribute to the support that has been shown for Sudan and South Sudan by so many friends and partners around the world. Sudan's African neighbors and the African Union played an essential part in making this day a reality. And along with our many international and civil society partners, the United States has been proud to play a leadership role across two administrations. Many Americans have been deeply moved by the aspirations of the Sudanese people, and support for South Sudan extends across different races, regions, and political persuasions in the United States. I am confident that the bonds of friendship between South Sudan and the United States will only deepen in the years to come. As Southern Sudanese undertake the hard work of building their new country, the United States pledges our partnership as they seek the security, development, and responsive governance that can fulfill their aspirations and respect their human rights.

As today also marks the creation of two new neighbors, South Sudan and Sudan, both peoples must recognize that they will be more secure and prosperous if they move beyond a bitter past and resolve differences peacefully. Lasting peace will only be realized if all sides fulfill their responsibilities. The Comprehensive Peace Agreement must be fully implemented, the status of Abyei must be resolved through negotiations, and violence and intimidation in Southern Kordofan, especially by the Government of Sudan, must end. The safety of all Sudanese, especially minorities, must be protected. Through courage and hard choices, this can be the beginning of a new chapter of greater peace and justice for all of the Sudanese people.

* * * *

On July 13, 2011, the United Nations Security Council recommended unanimously that South Sudan be admitted to the United Nations as its 193rd member state. Ambassador Susan Rice, U.S. Permanent Representative to the United Nations, welcomed the Security Council's action in remarks delivered that day, reprinted below and available at <http://usun.state.gov/briefing/statements/2011/168176.htm>. For Ambassador Rice's remarks at the General Assembly meeting on South Sudan on July 13, 2011, see <http://usun.state.gov/briefing/statements/2011/168552.htm>. As of December 31, 2011, 115 states had recognized South Sudan.

* * * *

Last Saturday, I had the honor of heading the U.S. delegation to Juba to celebrate South Sudan's independence. It was a deeply moving day. After a half-century of war, at a cost of more than two million lives, the Republic of South Sudan can now finally determine its own future. The United States salutes the courage and sacrifice of the people of South Sudan, who never abandoned hope. After so many years of bitter conflict, South Sudan's independence occurred peacefully and democratically through referendum—a heartening way for the world's newest nation to be born.

Vice President Machar, welcome and congratulations to the people of the Republic of South Sudan. We are delighted that you are here to represent your new government at this meeting where the Security Council unanimously recommended that your country be admitted as the United Nation's 193rd member state.

Ambassador Osman, we also commend the Government of Sudan's decision to be the first country to recognize South Sudan's independence. We welcome all efforts to forge a relationship between Sudan and South Sudan that is rooted in mutual respect and cooperation—a relationship that strengthens the viability, security, and prosperity of both states. By continuing on the path of peace, the Government of Sudan can redefine its relationship with the international community and secure a brighter future for its people.

Mr. President, the Security Council remains fully engaged in helping both countries towards their shared goals of peace and stability. On July 8, this Council unanimously authorized a new UN peacekeeping mission in the Republic of South Sudan. UNMISS will assist the government as it builds a new nation, including on issues of peacebuilding, development, security, and protection.

But as we all know, this moment of promise is also fragile and fraught. Sudan and South Sudan must work hard to secure an enduring peace and two viable states coexisting as peaceful neighbors. It is vital that both countries work with the African Union High-Level Implementation Panel to swiftly resolve all outstanding issues. The parties need to finalize arrangements on the border, citizenship, oil, and other issues if they are to forge an enduring peace.

* * * *

Mr. President, the challenges are great, but they are by no means insurmountable. The Security Council has done its utmost to support this process, and this Council and my government will remain deeply engaged in supporting the Republic of South Sudan at this crucial juncture and into the future.

My own country's history has taught us that it takes moral courage to attain freedom—and make freedom's promise real for all citizens. We've learned that this work is never done. We have great faith in the people of South Sudan. We expect they will create a government that works for the good of all people and for the stability of the region—and thereby create a country that strengthens this community of sovereign nations. As I said in Juba on Saturday, "a nation born from conflict need not live in conflict." In this spirit, and with great hope for the future of the world's newest nation, the United States wholeheartedly supports South Sudan's application for membership in the United Nations. Congratulations, and we look forward to welcoming you.

* * * *

2. Transitional National Council in Libya

On July 15, 2011, the United States recognized the TNC as the "legitimate governing authority" in Libya and stated that it no longer recognized the regime of Muammar Qadhafi. In a special briefing, excerpted below and available in full at www.state.gov/r/pa/prs/ps/2011/07/168662.htm, State Department officials explained how the TNC qualified for such recognition. Secretary Clinton also announced the recognition of the TNC as the government of Libya in remarks to the press, available at

www.state.gov/secretary/rm/2011/07/168656.htm.

* * * *

So we have been taking steps progressively over the course of the past few months to increase our engagement with the TNC to understand better its functions, its purposes, its objectives, and how it's acting in its capacity as a representative of the Libyan people. . . .

And then today, we took the additional step, as you ...have seen, of stating that until an interim authority is in place, we will recognize the TNC as the legitimate governing authority of Libya and deal with them on that basis and that we no longer recognize the Qadhafi regime as having any legitimate governing authority.

. . . [W]e've come to increasingly understand better and grow more comfortable with their stated commitments and efforts thus far to live up to those commitments, and we heard a number of assurances from them, both publicly and privately over the past several days, including their outline of a roadmap and a presentation today on the future of Libya and how they see the transition unfolding.

Those assurances go to issues like upholding their international obligations, pursuing a democratic reform process that is inclusive both in the geographic and in the political sense and dispersing any funds under their control in a transparent manner for the benefit of all the Libyan people.

And so one of the first predicates for us moving to the next step of recognizing them as the legitimate governing authority for this interim period was the statements and actions that they've taken to date. We'll continue to watch closely how they perform their functions moving forward both in terms of providing for those parts of Libya under their control and as they work through a political process and an eventual post-Qadhafi Libya.

* * * *

Finally, I would say that there is a practical consequence to this step of recognition, which is that we expect it will allow us to help the TNC access additional funds, and we are consulting with the TNC and working through a number of technical and legal details internally, and we're also consulting with our international partners on both the most effective and appropriate method for helping the TNC access those funds. So that's where we are.

The Contact Group as a whole has embraced the proposition that participants of the Contact Group will deal with the TNC as the legitimate governing authority of Libya until a new interim authority is in place, and that like us, they view the Qadhafi regime as not having any legitimate governing authority in Libya at this time. So this is not merely a statement by the United States of our position with respect to this issue, but a reflection of a growing international consensus about the way forward. . . .

* * * *

After the death of Qadhafi (on October 20) and the TNC's announcement that the country had been liberated (on October 23), the UN Security Council unanimously voted on October 27, 2011, to lift the no-fly zone over Libya and end operations to protect civilians

there, as authorized by Resolution 1973. On October 27, Ambassador Susan E. Rice, U.S. Permanent Representative to the UN, addressed the Security Council on the adoption of Resolution 2016 lifting the no-fly zone. Excerpts from her remarks follow. The full text is available at <http://usun.state.gov/briefing/statements/2011/176289.htm>.

* * * *

We are quite pleased that the Security Council has unanimously passed Resolution 2016, terminating the protection of civilians and no-fly zone authorizations that were contained in historic Resolution 1973. This has been quite an extraordinary period of activity for the Security Council, as well as for the United States, NATO, and Arab partners who participated in the enforcement of Resolution 1973.

And today, many months later, we have the prospect for a free and inclusive Libya, in which the aspirations of the Libyan people can finally be realized in the wake of the transition that's underway. We're very concerned that, as we move forward, that the authorities make maximum effort to swiftly form an inclusive government that incorporates all aspects of Libyan society, and in which the rights of all Libyan people are fully and thoroughly respected, regardless of their gender, their religion, their region of origin, et cetera. But for the United States, and, I think, for the United Nations Security Council, this closes what I think history will judge to be a proud chapter in the Security Council's history, and an experience where it acted promptly and effectively to prevent mass slaughter in Benghazi and other parts of the east, and to effectively protect civilians over the course of the last many months.

* * * *

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE

On May 2, 2011, the United States Supreme Court granted a petition for writ of certiorari in a case challenging the denial by the State Department of a request that "Israel" be listed as the place of birth in the passport of a U.S. citizen child born in Jerusalem. *Zivotofsky v. Secretary of State*, 131 S. Ct. 2897 (May 2, 2011). The U.S. District Court for the District of Columbia had dismissed the suit, brought by the parents of a child born in Jerusalem on his behalf, seeking to compel the State Department's implementation of a Congressional mandate in § 214(d) of the FY2003 Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350, which directs that "Israel" appear as the place of birth for a U.S. citizen born in Jerusalem, when the citizen so requests. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal, finding the case nonjusticiable under the political question doctrine because the President had exercised authority left exclusively to the executive branch—the power to recognize foreign governments—when determining not to recognize any government as sovereign over Jerusalem. In granting certiorari, the Supreme Court directed the parties to "brief and argue the following question: 'Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the

President's power to recognize foreign sovereigns.'" For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, and *Digest 2009* at 303-10.

In September 2011, the United States filed its brief in the Supreme Court, excerpted below (with most footnotes and citations to the record omitted) and available in full at www.justice.gov/osq/briefs/2011/3mer/2mer/2010-0699.mer.aa.pdf.^{*}

* * * *

STATEMENT

The status of the city of Jerusalem is one of the most sensitive and longstanding disputes in the Arab-Israeli conflict. For the last 60 years, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided by negotiations between the relevant parties within the peace process. This policy is rooted in the Executive's assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." The Executive similarly does not recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations.

One of the ways the State Department has implemented the United States' policy concerning the status of Jerusalem is in its rules regarding place-of-birth designations in passports and consular reports of birth abroad issued to U.S. citizens born in Jerusalem. Because the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports and reports of birth of U.S. citizens born in that city. Petitioner challenges this policy, seeking to have "Israel" designated as his place of birth. He relies on Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, which is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," and which purports to require the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1366.

* * * *

The Constitution assigns a broad range of foreign-affairs powers ... to the President alone. ... [O]f particular relevance to this case, the Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers." Art. II, § 3. That power includes the authority to decide which ambassadors the President will receive and, hence, the power to decide with which governments to establish diplomatic relations. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *United States v. Pink*, 315 U.S. 203, 229 (1942) (same).

^{*} Editor's note: On March 26, 2012, the Supreme Court issued its decision that the case does not present a nonjusticiable, political question and could properly be decided by the lower courts, remanding for a determination of the constitutionality of the statute. *Digest 2012* will discuss further developments in the case.

* * * *

United States policy concerning the status of Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See 7 *Foreign Affairs Manual (FAM)* 1383.1 (1987). Because the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. 7 *FAM* 1383.5-6, exh. 1383.1. Similarly, because the United States recognizes no state as having sovereignty over the territories of the West Bank and Gaza Strip, State Department rules mandate recording "West Bank" and "Gaza Strip" in the passports of United States citizens born in those locations. 7 *FAM* 1383.5-5.

* * * *

Congress has occasionally attempted to constrain the Executive Branch's ability to implement its recognition policy with respect to Jerusalem. ...

In 1995, Congress passed the Jerusalem Embassy Act of 1995, which states that the "[p]olicy of the United States" is that "Jerusalem should be recognized as the capital of Israel," and which purports to condition a portion of State Department funding on moving the U.S. Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a) and (b), 109 Stat. 399 (enacted into law without President's signature). While Congress was considering the bill, the Office of Legal Counsel (OLC) advised the President that the bill would unconstitutionally infringe the President's recognition power. See Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off. Legal Counsel 123 (1995). As enacted, the statute contains a waiver provision that permits the President to suspend the funding restriction for six months at a time to "protect the national security interests of the United States." § 7, 109 Stat. 400. Since the provision's enactment, Presidents Clinton, Bush, and Obama have repeatedly made the necessary finding to invoke the waiver provision and maintain the U.S. Embassy in Tel Aviv. See, e.g., 76 Fed. Reg. 35,713 (2011).

In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem. Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." § 214(a), 116 Stat. 1365. Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless that consulate "is under the supervision of the United States Ambassador to Israel." § 214(b), 116 Stat. 1366. Subsection (c) states that none of the funds authorized to be appropriated may be used for publication of any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel." § 214(c), 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of

Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). Even though it was accompanied by a Presidential Statement making clear that "U.S. policy regarding Jerusalem has not changed," *ibid.*, Section 214 provoked strong condemnation in the Middle East and confusion about United States policy toward Jerusalem.

* * * *

SUMMARY OF ARGUMENT

Petitioner's claim that he is entitled under Section 214(d) to have the Secretary of State designate "Israel" as his place of birth on his passport and consular report of birth abroad should be dismissed on either of two grounds. The claim presents a nonjusticiable political question. But even if the claim is justiciable, Section 214(d) is an unconstitutional encroachment on Executive authority. Both conclusions flow from the Constitution's grant to the President of the exclusive power to recognize foreign sovereigns and determine the extent of their territorial sovereignty, as well as the power to determine the content of passports in connection with the conduct of United States foreign policy.

I. A. Longstanding Executive Branch practice, congressional acquiescence, and judicial precedent establish that the President's express constitutional authority to "receive Ambassadors and other public Ministers" encompasses the exclusive power to recognize foreign states and their governments. U.S. Const. Art. II, § 3. Presidents have unilaterally exercised this recognition power since the Washington Administration. And although Members of Congress have occasionally proposed bills that would involve the Legislature in recognition decisions, those efforts have been rebuffed as inconsistent with the Constitution's assignment of such matters to the Executive alone.

Courts, including this Court, have consistently held that the constitutional recognition power belongs exclusively to the President. See, e.g., *United States v. Pink*, 315 U.S. 203, 229 (1942). This Court has also held that the recognition power includes all implied authorities necessary to effectuate its exercise. *Id.* at 229-230. One such implied authority is the President's power to determine on behalf of the United States the boundaries of foreign states. See *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

B. The President also has inherent authority to determine the content of passports insofar as it implements United States foreign policy. A passport is an official instrument of foreign policy through which the United States addresses foreign nations. See *Haig v. Agee*, 453 U.S. 280, 294 (1981). Historically, the Executive has been assumed to have inherent authority to issue passports and determine their content, in the exercise of the President's constitutional power over national security and foreign relations. See *id.* at 293-294.

Today, passport statutes typically further Congress's own enumerated powers or aid the Executive's passport authority, without purporting to constrain the Executive's use of passports as instruments of foreign policy. On the rare occasion when a passport statute encroaches on the

Executive's constitutional authorities, the President has declined to enforce it. Although Congress may enact passport legislation that is necessary and proper to implement its own enumerated powers, it may not regulate passports in a manner that constrains the President's exclusive authority to determine the content of passports as it relates to United States foreign policy, including determinations concerning the recognition of foreign states and their territorial sovereignty.

II. The State Department's policy not to record "Israel" as the place of birth in the passports or consular records of birth abroad of U.S. citizens born in Jerusalem implements the President's decision not to recognize any state's sovereignty over Jerusalem. That policy is also an exercise of the President's inherent authority to determine the content of passports in furtherance of his conduct of foreign policy. The description of a citizen's place of birth in passports operates as an official statement of whether the United States recognizes a state's sovereignty over the relevant territorial area. For this reason, the State Department has established detailed rules governing place-of-birth designations. Reversing its policy with respect to documents issued to U.S. citizens born in Jerusalem would have grave foreign-relations consequences.

III. Because petitioner's suit seeks to overturn a decision that the Constitution assigns exclusively to the President, it presents a political question. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). Petitioner's reliance on an asserted statutory right does not alter that conclusion. Because a basic function of the courts is to interpret statutes and the Constitution, courts presented with a statutory claim that potentially seeks review of a question that the Constitution commits to another Branch should undertake a careful inquiry into the nature of the relief sought and the interaction of that claim with the constitutional commitment at issue. If adjudicating the purported statutory right would entail reviewing or directing a decision that is constitutionally committed to a political Branch, the court should determine that the statute encroaches on the authority vested in that Branch and dismiss the suit. In other words, Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to another Branch.

Section 214(d) cannot be reconciled with the Constitution's grant of the recognition power to the President. By purporting to give petitioner the right to a judicial order directing the State Department to indicate in petitioner's passport that he was born in Israel, the provision seeks to define United States recognition policy. But the President has exclusive constitutional authority not to recognize any sovereignty over Jerusalem and to implement that determination in passports. Petitioner's Section 214(d) claim thus challenges a decision constitutionally committed to the President. The court of appeals therefore correctly dismissed this case as nonjusticiable.

IV. The question whether Section 214(d) is unconstitutional overlaps to a considerable extent with the question whether petitioner's claim for relief presents a nonjusticiable political question. Should the Court decide as a threshold matter that the case is justiciable, it should hold that Section 214(d) is unconstitutional because it encroaches on the President's exclusive constitutional authority to recognize foreign sovereigns.

* * * *

Cross References

TPS status for Sudan and South Sudan, **Chapter 1.D.2.**

Suspension of Libya from the Human Rights Council, **Chapter 6.A.3.d(2).**

Extension of immunities to offices in Bosnia and Herzegovina and Kosovo, **Chapter 10.E.2.**

Libya sanctions, **Chapter 16.A.1.**

Amendments to Sudan sanctions regulations, **Chapter 16.A.5.c.**

Middle East peace process, **Chapter 17.A.**

Peacekeeping in Sudan, **Chapter 17.B.1.**

Use of force in Libya, **Chapter 18.A.1.a.(1)**

Chapter 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602–1611, governs immunity from suits for foreign states in U.S. courts. The FSIA’s various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)–(6) and 1605A, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following items describe a selection of the significant proceedings that occurred during 2011 in which the United States intervened or participated as *amicus curiae*.

1. Definition of “foreign state” in the FSIA

On October 4, 2011, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in a case brought by the European Union (“EU,” formerly “EC”) and 26 of its member states against RJR Nabisco and related companies (“RJR”). *European Community v. RJR Nabisco*, No. 11-2475 (2d Cir. 2011). The lower court had dismissed the EU’s tort law claims against RJR on the basis that the EU did not qualify as a “foreign state” or an “agency or instrumentality” of a foreign state as defined in the FSIA, and therefore was essentially a nonentity for purposes of jurisdiction based on diversity of parties. The U.S. *amicus* brief, excerpted below (with most footnotes and citations to the record omitted), took the position that the EU, while not a foreign state, qualifies as an agency or instrumentality of a foreign state as defined in the FSIA, and therefore the lower court should not have dismissed for lack of diversity jurisdiction. In a separate section not included below, the United States brief also argued that the lower court improperly dismissed the EU’s federal claims under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act. The United States *amicus* brief is available at www.state.gov/s/l/c8183.htm.

* * * *

The district court dismissed the EC’s common law claims because it determined that the EC is not a “foreign state” within the meaning of the FSIA and the diversity jurisdiction statute. While the district court correctly determined that the EC is not recognized by the United States as a foreign state in its own right, the court erred in holding that the EC is not an agency or instrumentality of its member states. Because the FSIA defines “foreign state” to include such agencies or instrumentalities, the EC qualifies as a “foreign state” for purposes of the diversity

statute. Accordingly, the district court should not have dismissed the EC's state common law claims for lack of diversity jurisdiction.

A. The district court correctly concluded that the EC is not a "foreign state" in its own right. The FSIA does not define "foreign state" except to say that the term includes political subdivisions and agencies or instrumentalities. 28 U.S.C. § 1603(a). That is not surprising, because the Constitution gives the President the exclusive authority to recognize foreign states and their governments. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign government] is exclusively a function of the Executive."); *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) (holding that the Constitution gives the President exclusive power to recognize foreign sovereigns), *cert. granted* 131 S. Ct. 2897 (2011). For this reason this Court looks to the Executive Branch to determine a foreign person's citizenship for purposes of alienage jurisdiction. *Matimak Trading Co.*, 118 F.3d at 80–81. The district court here thus correctly concluded that, because the President has not recognized the EC as a foreign state, the EC does not qualify as a foreign state in the basic sense of that term.

On appeal, the EC seeks a remand to have the district court consider whether the EC is a "foreign state" under what the EC describes as the Supreme Court's "definition" of that term in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). EC Br. 44–47. A remand on that issue is unnecessary. In *Samantar*, the Supreme Court held that the FSIA does not govern the immunity of individual foreign officials. *Samantar*, 130 S. Ct. at 2282. The Court held that Congress codified standards for foreign state immunity in the FSIA, but left foreign official immunity determinations to the State Department. *Id.* at 2291. In reaching that conclusion, the Supreme Court considered whether foreign officials come within the FSIA's definition of "foreign state." *Id.* at 2286. The Court observed that "[t]he term 'foreign state' on its face indicates a body politic that governs a particular territory." *Ibid.* But Congress gave the term a "broader meaning, by mandating the inclusion of the state's political subdivisions, agencies, and instrumentalities." *Ibid.* (citing 28 U.S.C. § 1603(a)). The Court concluded, however, that Congress did not intend to include individual foreign officials even within this "broader meaning" of "foreign state." *Id.* at 2286–89.

The EC argues that it qualifies as a "foreign state" under what it characterizes as the Supreme Court's "definition" of that term as "'a body politic that governs a particular territory.'" (quoting *Samantar*, 130 S. Ct. at 2286). But *Samantar* nowhere addresses which branch of the United States Government determines which body politic governs what particular foreign territory. In light of the FSIA's silence on that question, courts cannot properly conclude that Congress intended to diminish the President's constitutional authority to recognize foreign states or assign that authority to the courts. *See Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.").

B. Although the President has not recognized the EC as a foreign state, the FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). To qualify as an agency or instrumentality of a foreign state, an entity must be a separate legal person, an organ of a foreign state, and not created under the laws of a third country. *Id.* § 1603(b). The district court concluded that the EC has independent legal status and is not created under the laws of a third country (*i.e.*, under the laws of a non-member state). These conclusions are correct. At the time it brought suit, the EC had separate legal personality. Consolidated Version of the Treaty Establishing the European Community (EC Treaty), art. 281,

Oct. 11, 1997, 1997 O.J. (C340) 293 (“The Community shall have legal personality.”). And because each member state ratified within its own legal system the treaty creating the EC, the EC was created under the laws of the member states. EC Treaty, art. 313, 1997 O.J. (C340) 302; *see In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 938 (7th Cir. 1996) (an entity created under the laws of a member state to an international agreement is not created under the laws of a third country).

Considering the EC’s status as an organ of its member states, the district court correctly concluded that an entity can qualify as an “organ” under the FSIA if it is an organ of multiple states. As used in the FSIA, an “organ of a foreign state” is an entity created by the state to carry out a public function. *See, e.g., Patrickson v. Dole Food Company*, 251 F.3d 795, 807 (9th Cir. 2001), *aff’d on other grounds* 538 U.S. 468 (2003). A foreign state acting alone can create an entity to carry out a public function, such as management of the state’s natural resources or the provision of basic needs such as water or electricity to remote parts of the country. Similarly, when foreign states jointly create an entity to carry out a public function, in some circumstances that entity can qualify as an “organ” under the FSIA.

Having concluded that the multi-national character of the EC is not a bar to the EC’s status as an organ, the district court next considered whether the EC qualifies as an organ under this Court’s *Filler* decision. *Filler* identified five factors as “relevant” to consideration of whether an entity is an organ of a foreign state:

1. “whether the foreign state created the entity for a national purpose”;
2. “whether the foreign state actively supervises the entity”;
3. “whether the foreign state requires the hiring of public employees and pays their salaries”;
4. “whether the entity holds exclusive rights to some right in the [foreign] country”; and
5. “how the entity is treated under foreign state law.”

Filler, 378 F.3d at 217. Considering these factors, the district court determined that the EC is not an organ of its member states. However, that conclusion resulted from a flawed application of the *Filler* factors. ...

The district court recognized that the member states formed the EC for quintessential national purposes: to establish a common market and monetary union, and to coordinate economic activities and policies throughout the member states. For the reasons given by the EC, that determination is correct. The United States has consistently taken the view that the public purpose factor is the most important consideration in determining an entity’s organ status. Brief for the United States as Amicus Curiae, *Powerex Corp. v. Reliant Energy Servs., Inc.*, at 6, 21–22, No. 05-85 (Sup. Ct. Mar. 2007). The district court paid little attention to this factor, other than to acknowledge that the EC satisfies it.

The remaining *Filler* factors support the conclusion that the EC is an organ of its member states, especially when considered in reference to the public purposes for which the EC was created. The treaty establishing the EC delegates from the member states to the EC the authority to exercise specified sovereign powers. *See, e.g.,* EC Treaty, art. 3, 1997 O.J. (C340) 181. The district court believed that this implies that the member states do not actively supervise the EC. However, this Court has held a state’s exercise of significant control over an entity supports organ status. *See, e.g., Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 476 F.3d 140, 143 (2d Cir. 2007) (finding active supervision of entity by state through “(1) appointing its governor and auditor; (2) acting through a related agency * * *; and (3) regulating

the inspection fees that [the entity] can collect”). The member states have extensive and ultimate control over the EC, defining its areas of authority and limiting its power to act outside those areas. EC Treaty, art. 5, 1997 O.J. (C340) 182 (“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. * * * Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”). That is sufficient to qualify as active supervision under *Peninsula Asset Management*.

The district court recognized that EC officials are “public employees” in that they exercise “powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities.” (quoting Case 149/79, *Commission of the European Communities v. Kingdom of Belgium*, 1980 E.C.R. 3881, ¶ 10). The district court thought that the third *Filler* factor did not support the EC’s organ status because EC officials are not public employees of the EC’s member states. But the third *Filler* factor asks whether the state “requires the hiring of public employees and pays their salaries,” not whether the state itself is the employer. *Filler*, 378 F.3d at 217. As the district court recognized, the treaty establishing the EC itself required the creation of certain positions, to be filled by public officials. And the EC member states funded much of the EC’s operations, including the pay of EC employees. ...

The EC satisfies the fourth *Filler* factor, as the district court concluded, because the EC member states delegated to the EC exclusive authority over certain sovereign functions. The EC, for example, “has exclusive competence * * * to conclude the Multilateral Agreements on Trade and Goods.” Opinion 1/94, *Competence to Conclude International Agreements Concerning Services and the Protection of Intellectual Property — Art. 228(6) of the EC Treaty*, 1994 E.C.R. I-5267, ¶ 34.

Finally, the district court erred in concluding that there was no evidence that any of the member states considered the EC to be their “organ.” In *Peninsula Asset Management*, this Court determined that the fifth *Filler* factor was satisfied because “the Korean government informed the State Department and the district court that it treats [the Financial Supervisory Service of the Republic of Korea] as a government entity.” 476 F.3d at 143. Here, every member of the EC but one is a plaintiff in this suit. Through their briefing, these member states informed the district court that they consider the EC to be a governmental entity. Because the State Department accepts the EC member states’ representation, that representation should be conclusive.

In sum, the factors this Court considers when evaluating an entity’s status as an organ of a foreign state compel the conclusion that the EC is an organ of its member states, especially when considered in reference to the clear governmental purposes the EC was established to further. Because the EC is an organ of its member states, and because it satisfies the other requirements under 28 U.S.C. § 1603(b), the EC is an “agency or instrumentality” of its member states. Accordingly, the EC is a “foreign state” within the meaning of the FSIA, and the district court erred in concluding that it lacked subject matter jurisdiction over the EC’s state law claims under the diversity statute.

* * * *

2. Exceptions to immunity

a. Commercial activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case “in which the action is based upon a commercial activity carried on in the United States

by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”

(1) Immunity from attachment of multinational research satellite

On May 3, 2011, the United States filed a statement of interest in the U.S. District Court for the Central District of California opposing the efforts by NML Capital, Ltd. to collect on debts owed by the government of Argentina by attaching its interests in a satellite, the Aquarius/SAC-D. *NML Capital, Ltd. v. Spaceport Systems Int’l.*, Case No. 11-03507-SJO-RZ. The Aquarius/SAC-D was designed to make sea surface salinity measurements from space, providing a previously unavailable volume of data for use in studying global ocean circulation. Excerpts of the U.S. statement of interest are set forth below (with footnotes and citations to the record omitted), arguing that the FSIA prohibits attachment of the satellite and that enjoining the launch of the satellite would severely disserve the public interest. The U.S. statement is available at www.state.gov/s/l/c8183.htm.

* * * *

The Aquarius/SAC-D represents the latest initiative in an established partnership between NASA and CONAE, the national space agency of Argentina, as part of a CONAE project known as the Satélite de Aplicaciones Científicas (Scientific Applications Satellite, or SAC). With respect to this particular mission, the NASA/CONAE partnership is governed by an international Memorandum of Understanding (MOU), signed by representatives of NASA and CONAE in March 2004. Pursuant to the MOU, CONAE has provided the spacecraft bus (i.e., the satellite’s infrastructure), while NASA has contributed the main scientific instrument, known as Aquarius, and the rocket that will serve as the satellite’s launch vehicle. The various components are critical to the Aquarius/SAC-D; in particular, the Aquarius instrument cannot fly without the SAC-D spacecraft. CONAE has also partnered with Italy, France, and Canada, each of which has contributed other scientific instruments to the satellite.

This multinational partnership allows the United States, and the global scientific community, to benefit from the expertise of many different national space programs. To date, NASA has invested approximately \$250,000,000 in the Aquarius/SAC-D program, and currently maintains a program workforce of approximately 50 full-time employees. Its international partners have similarly invested heavily in the Aquarius mission.

* * * *

ARGUMENT

I. The FSIA Prohibits Attachment of the Satellite

If the court determines that CONAE is an “agency or instrumentality” of Argentina, then CONAE’s property would be treated as distinct from that of Argentina, and would not be able to be used to satisfy NML’s judgment against the Republic. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069-74 (9th Cir. 2002). But if the court determines that CONAE is part of Argentina, as asserted by Plaintiff, then the FSIA makes property of a foreign state exempt from attachment and execution unless an exception to immunity applies. *See* 28 U.S.C. §§ 1609, 1610(a), (c). Because Plaintiff cannot show that the Argentina/SAC-D is being “used for a

commercial activity in the United States,” it cannot satisfy a threshold requirement for an exception to immunity. ...

* * * *

...[I]t is important to note that Plaintiff cannot, of course, use this proceeding to attach the property of the United States. Plaintiff dismisses this concern by contending that it seeks only the property of Argentina.... Even if the Court were to determine that Defendant’s interest in the Aquarius/SAC-D were otherwise subject to attachment, as a practical matter that interest could not be severed without doing substantial damage to the property of the United States. In any event, Plaintiff has failed to show that property of Defendant is subject to attachment.

* * * *

Here, the Aquarius/SAC-D is not used, and will not be used, for commercial activity. The nature of its activity is public, not commercial in nature. The satellite will be used to collect scientific data concerning ocean salinity levels on a scale never before seen by the scientific community, and will have profound impacts on our understanding of the effects of ocean salinity on ocean circulation and the climate. The operation of Aquarius/SAC-D is not an action of “trade and traffic or commerce,” *Weltover, Inc.*, 504 U.S. at 614, and Argentina is not acting as one player in a market through its operation of the satellite. There simply is no commercial “market” for the Aquarius/SAC-D to operate in.

Notably, the information obtained by Aquarius/SAC-D will be analyzed by NASA and then disseminated at no cost to the public, to benefit the global scientific community. Such a public dissemination underscores the public-spirited, non-commercial nature of the mission. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 92 (2d Cir. 2008) (charitable donations are not commercial activities because they “are not part of the trade and commerce engaged in by a ‘merchant in the marketplace’”); *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (considering “whether the activity is of the type an individual would customarily carry on for profit”); *United States v. County of Arlington, Va.*, 702 F.2d 485, 488 (4th Cir. 1983) (same). Rather than engaging in trade and commerce by contracting out the use of the satellite or selling the data obtained by the mission, NASA and CONAE will instead use the Aquarius/SAC-D to obtain scientific data for free public consumption and analysis, to contribute to our collective understanding of ocean salinity in order to improve climate modeling throughout the world.

That the purpose of the Aquarius/SAC-D is not commercial in nature is further underscored by the fact that the observatory’s components were contributed by national space agencies. Intergovernmental initiatives and cooperation are inherently the province of sovereigns. *See, e.g., EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 482 (2d Cir. 2007) (nation’s borrowing relationship with the International Monetary Fund is not “commercial” because membership in the international institution is limited to sovereigns). The assembled satellite is the combination of instruments and infrastructure from the space agencies of the United States, Argentina, France, Italy, and Canada, rather than private companies. NASA and CONAE have entered into a memorandum of understanding as to their respective obligations...

Plaintiff points to the fact that some commercial entities operate satellites, but that does not compel or even necessarily support the conclusion that the Aquarius/SAC-D is being used for a commercial activity. While a “commercial activity” must be something that a private individual can perform, that factor alone is not sufficient. The conduct that triggers an exception to immunity “must itself take place *in a commercial context*.” *Mwani v. bin Laden*, 417 F.3d 7, 17 (D.C. Cir. 2005) (emphasis added). The examples of “commercial activity” provided in the House and Senate reports on the FSIA demonstrate that active participation in the marketplace is

required to satisfy the statutory definition: “a foreign government’s sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation.” H.R. Rep. No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615; S. Rep. No. 94-1310, at 16 (1976). The Aquarius/SAC-D is not being used for any such activities; instead, the use of the Aquarius/SAC-D is limited to its use as a functioning satellite, gathering scientific information to be analyzed by NASA and CONAE scientists and then disseminated to the public.

* * * *

If the use of the satellite to collect scientific data could be seen as use for a commercial activity, the satellite would still be immune from attachment because Defendant is not performing such use in the United States. Plaintiff contends that Defendant is “‘using’ the [satellite] in the United States by testing and launching it from Vandenberg Air Force Base,” and that “satellite launches themselves are a commercial activity.” But a satellite is not “used” for testing and launching, and it is NASA, not Argentina, that will be responsible for the launch of the Aquarius/SAC-D. Any use of the satellite for commercial activities will be limited to its use *as a satellite*, which will necessarily occur after NASA has completed the launch on June 9 and the satellite is in orbit around the earth.

* * * *

Moreover, it is not sufficient that the property *will* be used for commercial activity; such use must be done now. *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) (“the property that is subject to attachment and execution . . . must have been ‘used for a commercial activity’ *at the time* the writ of attachment or execution is issued”) (emphasis in original); *id.* (“Section § 1610(a) does not say that the property in the United States of a foreign state that ‘*will* be used’ or ‘*could potentially* be used’ for a commercial activity in the United States is not immune from attachment or execution. More is required: the property . . . must be used.”) (emphasis in original).

As another court recently recognized, components of a satellite are not being used for commercial activity while they are still being constructed. *See NML Capital, Ltd. v. Republic of Argentina*, Case No. 03-cv-8845, 2011 WL 1533072, at *6 (S.D.N.Y. Apr. 22, 2011). Moreover, such use must be done by the foreign state, while the property is in the possession of the foreign state. *See id.* at 131 (plaintiff must show that the property *in the hands of the Republic* [of Argentina] must have been ‘used for a commercial activity’”) (emphasis in original); *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D. Mass. 2006) (“the ‘commercial use’ exception of § 1610(a) applies only where it is the foreign sovereign who engages in the commercial activity”).

Plaintiff’s contention that “satellite launches themselves are commercial activity,” thus misses the mark, because future use does not support an exception to immunity. Even if the Aquarius/SAC-D’s use as a functioning satellite could be regarded as use for a commercial activity, the cases discussed above make clear that the proper inquiry is whether the property is being used for a commercial activity now, at the time of its possible attachment and execution. To the extent that the use of Aquarius/SAC-D as a functioning satellite constitutes being “put into action, put into service, availed or employed” for a commercial activity, *see Af-Cap, Inc.*, 475 F.3d at 1091, that use will not occur until the satellite has been launched into orbit. At that

point, the satellite will be outside the United States, and thus not subject to attachment. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (“It is true that section 1610 does not empower United States courts to levy on assets located outside the United States.”).

* * * *

Accordingly, the satellite is not presently being “used for a commercial activity in the United States” because it is being tested and prepared for launch by NASA. And once the satellite is launched and is operating as a functioning satellite, it will not be “used for a commercial activity in the United States,” because it will be in orbit, outside the United States. Plaintiff thus cannot show that the satellite falls within the FSIA’s exception from immunity.

II. Enjoining the Launch of Aquarius/SAC-D Will Severely Disserve the Public Interest

Even if the Court determines that the Aquarius/SAC-D is subject to attachment, in considering whether to grant Plaintiff’s request for injunctive relief, the court must also “consider whether the public interest favors issuance of the injunction.” *Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc). *See also Winter*, 129 S. Ct. at 374 (“A plaintiff seeking a preliminary injunction must establish . . . that an injunction is in the public interest.”).

In its application, Plaintiff pays little attention to the public interest, arguing only that the public has an interest in facilitating the enforcement of judgments. In its reply, Plaintiff makes the remarkable assertion that “[t]he relief sought will have no effect on the satellite mission other than to impose a lien on Argentina’s interest in it.” Plaintiff’s statement betrays a complete misunderstanding of the property at issue in this case. Seeking an injunction only weeks before the satellite’s launch, Plaintiff ignores the direct and concrete harms that will result to NASA and the United States, against whom Plaintiff has no legal grievance. The Aquarius instrument cannot fly without the SAC-D spacecraft, and removal of the spacecraft itself would thus have a remarkably detrimental impact on parties beyond Argentina. The United States and its other foreign space partners simply should not be made to pay on account of a dispute between Plaintiff and Defendant—a dispute wholly unrelated to the Aquarius/SAC-D satellite and mission. The public interest would be severely disserved by an order enjoining the launch of the Aquarius-SAC/D.

Congress has recognized that the public interest is served by missions such as the Aquarius/SAC-D. *See* 11A Fed. Prac. & Proc. Civ. § 2948.4 (2d ed.) (“The public interest may be declared in the form of a statute.”) (quoted in *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)). Congress has declared “that the general welfare and security of the United States require that adequate provision be made for aeronautical and space activities.” 42 U.S.C. § 2451(b) (2005). Moreover, it is the policy of the United States to undertake aeronautical and space activities to contribute to “[t]he expansion of human knowledge of the Earth,” *id.* § 2451(d)(1), and to engage in “[c]ooperation by the United States with other nations and groups of nations” in pursuit of that goal, *id.* § 2451(d)(7).

* * * *

Despite Plaintiff’s unsupportable assertion that a temporary restraining order “will have no effect on the satellite mission other than to impose a lien on Argentina’s interest in it,” the fact is that NASA could not substitute for the satellite bus just weeks before launch. Custom-designed and manufactured for the specifications of this mission, the Aquarius/SAC-D “has now been fully assembled, and removal of any of the instruments (including Aquarius) could

significantly (and potentially permanently) damage the observatory.” Even replacing a relatively minor instrument at this stage would invalidate the extensive testing performed thus far. Of course, losing the spacecraft bus—the infrastructure of the satellite itself—would have far more significant consequences.

* * * *

Finally, an injunction also could have consequences for the treatment of the United States abroad under principles of reciprocity. This is particularly so in the context of the attachment and execution of property because, as discussed above, “some foreign states base their sovereign immunity decisions on reciprocity.” See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). NASA also contributes to missions based in foreign nations, and has a substantial interest in ensuring that those missions can go forward under similar circumstances. A U.S. court’s decision to enjoin the launch at this stage could encourage foreign courts to issue similar orders against United States interests abroad.

The severe consequences that an injunction would have for NASA and the United States strongly militate against this Court’s enjoining the launch of the Aquarius/SAC-D.

* * * *

(2) *McKesson v. Iran*: whether the commercial activity exception creates a cause of action

As discussed in Chapter 5, the United States filed an *amicus* brief in the U.S. Court of Appeals for the District of Columbia Circuit on July 27, 2011 in *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174. Excerpts below are from the section of the brief arguing that the commercial activity exception does not authorize a court to create a federal common law cause of action founded in customary international law (footnotes and citations to the record have been omitted). The section of the brief discussing the act of state doctrine is excerpted in Chapter 5. The brief also contained a section on the Treaty of Amity between the U.S. and Iran. The brief is available at www.state.gov/s/l/c8183.htm.*

* * * *

A. McKesson brought this action against Iran by invoking the jurisdiction of the FSIA, specifically the commercial activity exception to immunity under that statute, 28 U.S.C. § 1605(a)(2). See *McKesson V*, 539 F.3d at 491 (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449-451, 453 (D.C. Cir. 1990) (*McKesson I*); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350-351 (D.C. Cir. 1995) (*McKesson II*), cert. denied, 516 U.S. 1045 (1996)). In the most recent appeal, this Court directed the district court on remand to reconsider whether customary international law can be construed to provide a cause of action against Iran “in light of, *inter alia*, the Supreme Court’s intervening decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).” *McKesson V*, 539 F.3d at 491.

The district court here erroneously held that the FSIA commercial activity exception authorizes a United States court to create a federal common law cause of action for expropriation

* Editor’s note: On February 28, 2012, the Court of Appeals issued its decision in the case, agreeing with the argument presented in the United States brief that the FSIA does not create a cause of action for alleged violation of customary international law.

under customary international law. Neither the text of the commercial activity exception nor its legislative history in any way refers to claims founded in customary international law. ...

The FSIA commercial activity exception does not constitute the kind of exceptional grant of jurisdiction permitting federal courts to exercise residual judicial authority to fashion federal “common law claims derived from the law of nations.” *Sosa*, 542 U.S. at 731 n.19. In particular, there is no basis to conclude—as the district court did here—that the commercial activity exception permits a federal court to create a federal common law cause of action for expropriation by reference to international law.

The Supreme Court in *Sosa* made clear that the Alien Tort Statute, 28 U.S.C. § 1350, is unusual in its contemplation that federal courts could create a federal common law cause of action based on customary international law in certain limited circumstances. The text of that statute explicitly contemplates a “civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. That language stands in sharp contrast to the FSIA commercial activity exception (quoted above), which refers to the commercial activity of foreign governments as a reason why the defense of foreign sovereign immunity is unavailable, but notably makes no mention of either causes of action or customary international law.

The majority in *Sosa* took pains to distinguish the Alien Tort Statute from the general grant of federal-question jurisdiction in 28 U.S.C. § 1331, which the Court determined did not permit courts to look to customary international law for the creation of a new federal common law cause of action. See *Sosa*, 542 U.S. at 731 n.19. The *Sosa* Court’s extensive and careful scrutiny of the Alien Tort Statute demonstrates the unusual circumstances necessary to find that a jurisdictional statute authorizes federal courts to derive new causes of action from customary international law. See *id.* at 712-731. We are aware of no case in which a federal court has applied *Sosa* to find such an authorization in any other statute, including the FSIA.

B. The district court failed to acknowledge this essential point of *Sosa*. The decision below too quickly concluded that the FSIA commercial activity exception, “like the [Alien Tort Statute],” permits courts to “apply causes of action based on international law.” 2009 Op. 8. Courts can generally look to international law when interpreting the terms of the FSIA. See *ibid.* (citing *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1294-1295 (11th Cir. 1999)). But that general proposition does not support the quite different determination that the FSIA commercial activity exception authorizes creation of a federal common law cause of action derived from customary international law. *Aquamar* did not involve any claimed reliance on a cause of action based on customary international law; nor did that case involve claims under the FSIA commercial activity exception. Neither *Aquamar* nor any other case of which we are aware applied the analysis of *Sosa* to the FSIA commercial activity exception.

The district court quoted *Sosa* to suggest that a cause of action under the law of nations is generally available if Congress has not precluded it. But the quoted passages are not part of the Supreme Court’s analysis of the particular reasons to read the Alien Tort Statute differently from other grants of federal jurisdiction, see *Sosa*, 542 U.S. at 714-724. Thus, the Supreme Court in *Sosa* “affirmed that the domestic law of the United States recognizes the law of nations” in “appropriate circumstances.” *Id.* at 729-730 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). And Congress had not expressly precluded the *Sosa* Court’s interpretation of the Alien Tort Statute. *Ibid.* But those factors by themselves did not dictate the Court’s interpretation of the statute. Indeed, the observations quoted by the district court here

would apply equally to any grant of federal jurisdiction, including the federal question statute, 28 U.S.C. § 1331, which the Court in *Sosa* specifically said does not authorize courts to create a federal common law cause of action founded in customary international law, see *Sosa*, 542 U.S. at 731 n.19.

The district court also pointed to a different provision of law: the FSIA expropriation exception, 28 U.S.C. § 1605(a)(3). But the expropriation exception is not at issue in this case. Even if the FSIA expropriation exception, like the Alien Tort Statute, could be read to permit a court to fashion a cause of action as a matter of federal common law by reference to customary international law, that result would not support the district court's erroneous determination that the commercial activity exception should be read to do the same.

C. McKesson does not argue that the FSIA commercial activity exception, 28 U.S.C. § 1605(a)(2), itself bears any indicia of congressional intent to permit federal courts to create a federal common law cause of action founded in customary international law. Instead, McKesson's brief relies on other statutes, pointing to the language of the FSIA expropriation exception, 28 U.S.C. § 1605(a)(3), and to a statutory provision that antedates the FSIA altogether, 22 U.S.C. § 2370(e)(1)-(2) (the Hickenlooper Amendment, which contains some language similar to the FSIA expropriation exception). But those statutes are not the basis for the district court's jurisdiction in this case, and they do not answer the question of Congress' intent in enacting the FSIA commercial activity exception.

McKesson also suggests that the distinction between the FSIA commercial activity and expropriation exceptions should be disregarded for these purposes. By seeking to isolate the FSIA's grant of federal jurisdiction in 28 U.S.C. § 1330(a) from the statute's enumerated immunity exceptions in 28 U.S.C. § 1605, McKesson improperly disregards the significance of the precise limitations Congress imposed in each of the separate statutory exceptions to foreign sovereign immunity, as set forth in § 1605(a)(1)-(6). The FSIA is not an atomized collection of disparate provisions, and the statute's jurisdictional grant—which explicitly refers to and requires a “claim for relief * * * with respect to which the foreign state is not entitled to immunity * * * under sections 1605-1607 of this title,” 28 U.S.C. § 1330(a)—cannot be so readily divorced from the exceptions to immunity that themselves define and determine the scope of the jurisdiction over any such claim. Thus, Congress made clear that the FSIA expropriation exception applies only when specific conditions are satisfied, such as the requirement that the property taken (or property exchanged for the property taken) be present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or alternatively that the property be owned by a foreign state agency or instrumentality engaged in commercial activity in the United States. See, e.g., *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010) (en banc), cert. denied, ___ U.S. ___ (No. 10-786 June 27, 2011).

By contrast, the premise of the FSIA's commercial activity exception is that, under the “restrictive” theory of sovereign immunity, a foreign nation may fairly be held liable for conduct that is “private or commercial in character” when it acts “in the manner of a private player within the market.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (internal quotation marks omitted). Congress would have had little reason to expect that, in deciding whether a foreign state was liable for such private conduct, federal courts would have any need to create federal common law causes of action or otherwise look beyond the ordinary rules of commercial law that govern “private player[s] within the market.” *Ibid.* The legislative history of the FSIA confirms that the statute was “not intended to affect the substantive law of liability.” H.R. Rep.

No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610; see also, e.g., *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003) (courts “have no free-wheeling commission to construct common law as we see fit” because the FSIA “instructs us to find the law, not to make it”).

The FSIA’s carefully delineated exceptions must be read as an integral part of the comprehensive statutory scheme Congress adopted. That scheme does not merely grant subject-matter jurisdiction over a specified category of cases, but addresses a wide variety of related and carefully linked subjects concerning claims against foreign sovereigns. Thus, the FSIA prohibits state as well as federal courts from exercising jurisdiction over any claim against a foreign state unless it comes within an exception to foreign sovereign immunity, and the statute also specifies rules for personal jurisdiction, venue, removal, and attachment and execution for cases that come within an exception.

The Supreme Court has emphasized that “subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), quoted in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989). While the Court did not specifically address the question raised in this case, the emphatic and repeated references to the FSIA’s “comprehensive [statutory] scheme,” e.g., *Amerada Hess*, 488 U.S. at 435 n.3; *Verlinden*, 461 U.S. at 496, refute McKesson’s efforts to elide the significant differences between the FSIA commercial activity and expropriation exceptions.

McKesson also suggests that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), can be read to create a cause of action. But that statute is not a grant of jurisdiction, like the Alien Tort Statute or the FSIA, and it does not purport to enact or codify any cause of action. The Hickenlooper Amendment was intended to limit the Supreme Court’s decision in *Sabbatino* concerning the applicability of the act of state doctrine to litigation concerning certain claims for expropriation. See, e.g., *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1293-1294 (11th Cir. 2001). It says nothing about the source of any right to bring such claims in the first instance.

Moreover, the Supreme Court’s decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Cort v. Ash*, 422 U.S. 66 (1975), demonstrate the error of trying to find an implied right of action in the Hickenlooper Amendment. *Cort* and its progeny make clear that the Supreme Court has “sworn off the habit of venturing beyond Congress’s intent” concerning implied private rights of action. *Alexander*, 532 U.S. at 287, cited in *McKesson V*, 539 F.3d at 490.

Like the district court, McKesson fails to understand the principal lesson of *Sosa*. McKesson’s brief disregards the significance of the inquiry into whether a particular jurisdictional statute can be read to authorize federal courts to create new federal common law causes of action founded in customary international law. That inquiry in this case properly focuses on the FSIA commercial activity exception, and there is no indication that Congress imbued that provision with the same attributes as the Alien Tort Statute, which *Sosa* interpreted to give federal courts that authority in certain circumstances.

This Court recently reiterated the Supreme Court’s call for “caution” in *Sosa*. See *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1093 (D.C. Cir. 2011); see also *id.* at 1098 (Rogers, J., concurring) (citing “traditional principles of judicial restraint, especially in light of *Sosa*’s specific grounds for caution in the ATS context”). The Court’s recognition of the need for circumspection in the creation of federal common law causes of action properly extends as well to the first step of the *Sosa* analysis: whether the jurisdictional statute at issue contemplates such judicial lawmaking at all. Here, there is no occasion to reach the question whether a particular

cause of action should be recognized (the issue in *Ali Shafi*), as the commercial activity exception to the FSIA does not contemplate such an inquiry at all.

* * * *

(3) “Direct effect” requirement

In December 2011, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States advocating denial of the petition for certiorari in *Republica Bolivariana de Venezuela v. DRFP L.L.C., d/b/a Skye Ventures*, No. 10-1144. Petitioner Venezuela sought certiorari after the lower court denied its motion to dismiss the case and the Court of Appeals for the Sixth Circuit affirmed that decision as to Venezuela’s claim that the conduct at issue did not cause “a direct effect in the United States” as required under the FSIA. Respondent Skye Ventures originally filed suit against Venezuela after seeking payment on bearer promissory notes issued by a Venezuelan bank (“Bandagro”) and backed by the government of Venezuela. Skye Ventures asserted that the notes were governed by the laws of Switzerland and the Uniform Rules for Collections set out in an International Chamber of Commerce (“ICC”) publication and therefore entitled the bearer to demand payment anywhere the notes were held. Excerpts of the United States brief below discuss the application of the FSIA (with footnotes and citations to the record omitted). The full text of the United States brief is available at www.justice.gov/osq/briefs/2011/2pet/6invit/2010-1144.pet.ami.inv.pdf.**

* * * *

A. The Sixth Circuit’s Application Of The FSIA Is Correct And Is Consistent With The Decisions Of Other Courts Of Appeals

1. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court examined the commercial-activity exception of the FSIA that permits the exercise of jurisdiction where an act occurring outside the United States has a “direct effect” within the United States. The Court explained that “an effect is direct if it follows as an immediate consequence of the defendant’s * * * activity,” and that Section 1605(a)(2) does not contain “any unexpressed requirement of substantiality or foreseeability.” *Id.* at 618 (citation and internal quotation marks omitted). The Court then applied that standard to government bonds issued by Argentina, which provided for payment “through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor.” *Id.* at 609-610. Because the bondholder had chosen New York as the place of payment, the Court concluded that “New York was thus the place of performance for Argentina’s ultimate contractual obligations.” *Id.* at 619. The sovereign’s nonpayment therefore “necessarily” created the requisite direct effect under Section 1605(a)(2) because “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.” *Ibid.*

The court of appeals’ decision is a straightforward application of *Weltover*. The court of appeals first addressed whether the provisions of the Bandagro notes gave respondent the right to

** Editor’s note: The Supreme Court issued its decision denying certiorari in the case in January 2012.

designate the United States as the place of payment. The court concluded that, by providing that the notes are governed by Swiss law and ICC rules, the parties had agreed that respondent “had the right to designate the United States as a place of payment of the notes,” which respondent had done. Having so answered that antecedent question, the court correctly viewed the circumstances as analogous to those presented in *Weltover*: as in that case, the notes at issue gave the holder the right to choose the place of payment on the notes, and the holder chose the United States. The court therefore concluded, consistent with *Weltover*, that when petitioners failed to pay on the bonds, “money that was supposed to have been delivered to [respondent] at its office in Columbus was not forthcoming, causing a direct effect in the United States” under Section 1605(a)(2).

Petitioners argue that the Sixth Circuit erroneously found a “direct effect” in the United States “simply because [the notes] do not specifically *preclude* payment in the United States.” The premise of petitioners’ argument is incorrect, however, because the court did not construe the notes as silent regarding place of payment. Rather, the court held that the notes’ terms reflected an affirmative agreement that permitted the holder to choose to demand payment in the United States. The question whether *Weltover* would permit a court to find a “direct effect” under Section 1605(a)(2) based on notes that are altogether silent as to the place of payment is thus not presented here. And, as discussed further below, whether the court correctly construed the notes’ provisions as addressing the place of payment is not a question that independently warrants this Court’s review.

2. Petitioners contend that the courts of appeals are “irreconcilably fractured” regarding when, under *Weltover*, a foreign state’s refusal to make payment at a United States location causes a direct effect in the United States. Petitioners are incorrect.

Applying *Weltover*, the courts of appeals that have addressed the issue have unanimously concluded that a foreign sovereign’s nonpayment in the United States on a debt instrument or contract that permits the payee to designate a United States locale as the place of payment, when the payee has made such a designation, creates a “direct effect” in the United States under Section 1605(a)(2). See *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998) (where the instrument authorized the plaintiff to choose any location as the place of payment, including the chosen locale of New York, defendant’s failure to pay caused a direct effect under *Weltover*, and there was no need for the instrument expressly to designate the United States); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997) (an agreement requiring only that the plaintiff utilize a “non-Nigerian bank” permitted the plaintiff to elect a bank in New York as the place of payment, and Nigeria’s failure to satisfy contractual obligations in New York “necessarily had a direct effect in the United States” under *Weltover*); see also *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002) (agreeing with courts that “found a direct effect when a defendant agrees to pay funds to an account in the United States and then fails to do so”), abrogated on other grounds by *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

The courts of appeals also generally agree that if a contract or debt instrument does not contemplate that the noteholder may specify a place of payment within the United States, or the noteholder designates a location outside the United States, there is *not* the requisite direct effect within the United States. See, e.g., *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1237-1238 (10th Cir. 1994) (finding no direct effect where a contract specified Paris as the place of payment and did not contemplate that either party would perform any part of the contract in the United States, even though the contract’s provision that payment be made in

U.S. dollars meant that a U.S. bank might be incidentally involved in converting payment to dollars), cert. denied, 513 U.S. 1112 (1995); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146-1147 (D.C. Cir. 1994) (no direct effect when the only connection to the United States was that some of the payments were made *from* U.S. bank accounts, and “[n]either New York nor any other United States location was designated as the ‘place of performance’ where money was ‘supposed’ to have been paid”), cert. denied, 513 U.S. 1079 (1995). But see *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 889, 896 (5th Cir.) (*Voest-Alpine*) (finding a direct effect caused by nonpayment in the United States on a contract that was silent as to the place of payment, when the foreign sovereign acknowledged a practice of sending the funds to the location designated by debtholder), cert. denied, 525 U.S. 1041 (1998).

Here, because the Sixth Circuit concluded that the Bandagro notes permitted respondent to designate the United States as the place of payment, the court’s ruling that petitioners’ nonpayment after respondent chose the United States caused a direct effect in the United States is consistent with the decisions addressing similar agreements. See, e.g., *Hanil Bank*, 148 F.3d at 132.

Nonetheless, petitioners urge that review is warranted because a conflict exists between those courts that require a plaintiff to show that the foreign sovereign performed a “legally significant act” within the United States in order to establish a direct effect within the meaning of Section 1605(a)(2), and those courts, like the Sixth Circuit, that eschew such a requirement. Although petitioners are correct that the courts of appeals have disagreed as to whether a “legally significant act” is necessary after this Court’s *Weltover* decision, that disagreement is not implicated here because the outcome in this case would be the same under either approach. The Second and Ninth Circuits, which require a legally significant act in the United States, have held that such an act occurs when—as the courts below found—a sovereign fails to make payments on a debt instrument that permits the holder to designate any place of payment and the holder has chosen the United States. See *Hanil Bank*, 148 F.3d at 129-130, 133 (when plaintiff could choose any place of payment and chose the United States, the “most legally significant act—the breach of contract—occurred in the United States”); *Adler*, 107 F.3d at 727 (finding that nonpayment to U.S. bank, when agreement provided that payment would be made to a “non-Nigerian bank,” was a legally significant act).

Finally, petitioners argue that contrary to the Sixth Circuit’s decision, some courts of appeals have held that the debt instrument must “*expressly* specify the United States as a place of payment or authorize the plaintiff to designate the place.” None of the cases on which petitioners rely, however, suggests that an agreement must expressly name the United States as the place of payment. See, e.g., *Guevara v. Republic of Peru*, 608 F.3d 1297, 1309-1310 (11th Cir.) (concluding that plaintiff’s failed attempt, from the United States, to claim a reward offered and administered in Peru did not create a direct effect), cert. denied, 131 S. Ct. 651 (2010); *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 239 (2d Cir. 2002) (noting that in a previous case, “[s]atisfaction of the geographical jurisdictional nexus * * * depended on the fact that the contract stipulated performance in New York,” but not suggesting that such an express stipulation was the only way to create the necessary direct effect).

* * * *

b. Expropriation exception

Section 1605(a)(3) of the FSIA provides an exception for immunity in cases of alleged expropriation:

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

In May 2011, the United States submitted a brief as *amicus curiae* in the Supreme Court of the United States at the invitation of the court which addressed the meaning of the expropriation exception in the FSIA. *Kingdom of Spain v. Estate of Claude Cassirer*, No. 10-786. As discussed in Chapter 8, the case was brought by the estate of the descendant of a former owner of a painting that was confiscated by Nazi Germany and later came to be owned by an agency of the Spanish government. The United States brief is available at www.justice.gov/osq/briefs/2010/2pet/6invit/2010-0786.pet.ami.inv.pdf. Excerpts below address the applicability of the expropriation exception (with citations to the record and most footnotes omitted). See Chapter 8 for discussion of the section in the brief addressing whether there is an exhaustion requirement prior to seeking relief for expropriation under the FSIA in U.S. courts. The Supreme Court denied *certiorari*, allowing the case to proceed at the district court level.

* * * *

1. The court of appeals correctly concluded that the exception to foreign sovereign immunity in Section 1605(a)(3) applies in this case and permits the exercise of subject-matter jurisdiction over the Foundation. The statute contains two jurisdictional prerequisites, and respondent's complaint satisfies both of them. *First*, Section 1605(a)(3) requires that a plaintiff's suit be one "in which rights in property taken in violation of international law are in issue." In his complaint, respondent alleges—and petitioners do not challenge before this Court—that the Foundation owns a Pissarro painting taken from respondent's grandmother by the Nazi government in violation of international law. Respondent's "rights in property taken in violation of international law" are therefore very much "in issue" in this case.

Second, Section 1605(a)(3) requires either that the property be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or that the property be "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." Here, respondent does not allege that the Pissarro painting is "present in the United States" in connection with any commercial activity carried on by Spain. But respondent does allege—and petitioners again do not challenge before this Court—that the Foundation is an instrumentality of Spain engaged in commercial activity in the United States. Respondent's complaint therefore satisfies Section 1605(a)(3)'s express requirements with respect to the Foundation.

2. a. Petitioners argue that the expropriation exception is ambiguous because "[it] does not expressly say" whether the property at issue must have been taken "by the [defendant] foreign state" or "by *any* foreign state," and they contend that this supposed ambiguity should be

resolved by requiring that the defendant foreign state have been the wrongdoer. But the absence of any reference to the responsible foreign state indicates that Congress was interested in the fact of the unlawful expropriation, not the identity of the expropriator. Congress drafted the exception to govern all cases “in which rights in property taken in violation of international law are in issue” (if the requisite nexus to commercial activity is also present), without regard to whether the defendant foreign state took the property or subsequently came into possession of it. As the court of appeals explained, “[t]he text is written in the passive voice, which ‘focuses on an event that occurs without respect to a specific actor.’” (quoting *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009)). “Thus, the text already connotes ‘any foreign state,’” and the court interpreted the statute in accord with its most natural meaning.

The FSIA’s emphasis on the fact of a taking carries over to its provision governing attachment of a foreign state’s property in the United States, 28 U.S.C. 1610 (2006 & Supp. III 2009). Section 1610(a)(3) parallels Section 1605(a)(3): it provides that certain property is not immune from attachment to execute “a judgment establishing rights in property which has been taken in violation of international law.” But elsewhere in the FSIA’s attachment provision, Congress concentrated on the identity of the expropriator. Section 1610(f)(1) permits the attachment of certain property owned by a foreign state found liable for terrorism, and refers to property “expropriated or seized by the foreign state.” 28 U.S.C. 1610(f)(1)(B) (emphasis added). That is because the parallel jurisdictional exception permits suits for monetary damages “against a foreign state” for terrorist acts committed by agents “of such foreign state.” 28 U.S.C. 1605A(a)(1) (Supp. III 2009). Where Congress has chosen to make an exception to foreign sovereign immunity turn not simply on the fact of expropriation but the identity of the expropriating state, it has said so in the FSIA. Congress has not so provided in Section 1605(a)(3).

b. Petitioners also assert that the expropriation exception was “intended to apply to foreign states that have committed a jurisdictionally-significant act.” That assertion begs the question of what act by a foreign state should be considered jurisdictionally significant. The text of the FSIA supplies the answer: If the case is one “in which rights in property taken in violation of international law are in issue,” then the conduct that gives rise to jurisdiction is commercial activity in the United States by the foreign state or instrumentality: either (i) the expropriated property is “present in the United States in connection with a commercial activity carried on in the United States by the foreign state” or (ii) the property is “owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. 1605(a)(3). Section 1605(a)(3)’s reliance on commercial activity in the United States by the foreign state or instrumentality as the jurisdictionally significant act is consistent with the general practice under the restrictive theory of immunity of abrogating such immunity based on commercial activities conducted by a foreign state in the forum state. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487, 488-489 (1983).

3. Petitioners ground their arguments in a number of policies and authorities outside the FSIA. None counsels in favor of a different interpretation of Section 1605(a)(3).

a. Petitioners argue that the decision below conflicts with the State Department’s espousal policy. Espousal is the process by which the “government of the United States, usually through diplomatic channels, makes [a private citizen’s claim] the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the

injury.” *Abraham-Youri v. United States*, 139 F.3d 1462, 1463 n.2 (Fed. Cir. 1997) (citation omitted). As petitioners note, the State Department will consider espousing a claim of expropriation against a foreign government only if certain conditions are satisfied, including that (i) the claimed violation of international law is attributable to that foreign government, and (ii) the claimant has exhausted local remedies in the relevant country or demonstrated that exhaustion would be futile.

The State Department’s espousal policy does not, and is not intended to, have any logical bearing on the proper interpretation of Section 1605(a)(3). The espousal policy governs when the United States will adopt the claim of one of its citizens for the purposes of state-to-state resolution; it does not govern whether the rights of U.S. citizens under international law have been violated in the first instance, let alone whether those citizens can satisfy the FSIA’s expropriation exception and invoke the jurisdiction of federal courts. Indeed, one purpose of the FSIA was to enable private parties to obtain—and, in some instances, to execute upon—judgments against foreign states or instrumentalities without the need for State Department espousal. Cf. 28 U.S.C. 1602; H.R. Rep. No. 1487, 94th Cong., 2d Sess., 8, 13, 27-29 (1976) (1976 House Report). There is no basis, then, for the State Department’s diplomatic policy governing resolution of claims with foreign nations to limit the FSIA’s exceptions to sovereign immunity for suits by private parties.

b. Petitioners contend that international law permits jurisdiction over a foreign state or instrumentality only for conduct that itself violates international law. Petitioners cite no authority for that proposition, and in any event the FSIA subjects foreign states to suit in a variety of circumstances that do not involve any violation of international law. See, e.g., 28 U.S.C. 1605(a)(2) (exception to foreign sovereign immunity for suits based on a foreign state’s commercial activity in the United States); 28 U.S.C. 1605(a)(4) (same; suits in which certain rights in property in the United States are at issue); 28 U.S.C. 1605(a)(5) (same; suits based on certain types of tortious conduct); see also Convention on Jurisdictional Immunities of States and Their Property Art. 10, U.N. Doc. A/59/508 (2004) (exception to foreign sovereign immunity for claims arising out of certain commercial transactions); *id.* Art. 11 (same; claims relating to certain employment contracts); *id.* Art. 13 (same; claims arising out of ownership, possession, or use of certain property in the forum state).

c. Petitioners point to the Restatement (Third) of Foreign Relations Law of the United States (1987) (Restatement). Section 455 of the Restatement addresses the immunity of foreign states from jurisdiction, and it appears to contemplate that immunity is withdrawn only for an expropriating state. See 1 Restatement § 455(3)(a) and (b) at 411; *id.* § 455 cmt. c at 412 (stating that jurisdiction is appropriate in part if “the property was taken by the foreign state in violation of international law”). But the Restatement was drafted in 1987, eleven years *after* the FSIA was enacted. And although the Restatement says that it “reflect[s] Section 1605(a)(3)” of the FSIA, *ibid.*, it adds a requirement—that the property at issue was “taken by the foreign state”—that is not present in Section 1605(a)(3), without indicating whether that choice of wording was meaningful, imprecise, or inadvertent. Even assuming that the drafters of the Restatement intended to address, *sub silentio*, jurisdiction over a nonexpropriating state, petitioners cite no authority for the proposition that the text of the Restatement (and its commentary) should control over the quite different and broad text of the FSIA itself.

d. Finally, petitioners rely on the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). That provision was enacted following this Court’s decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which held that the act of state doctrine barred litigation of the ownership

of property that had been expropriated by the Cuban government. *Id.* at 436-437. The Hickenlooper Amendment overturns that result. It provides that United States courts shall not “decline on the ground of the federal act of state doctrine to make a determination on the merits” in a case “in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking * * * by an act of that state in violation of the principles of international law.” 22 U.S.C. 2370(e)(2). Petitioners contend that the Hickenlooper Amendment abrogates the act of state doctrine only for expropriating states, and the FSIA’s waiver of foreign sovereign immunity should be interpreted in parallel fashion.

As an initial matter, it is not established that the Hickenlooper Amendment denies an act of state defense to a foreign state only if that state confiscated the property at issue, and petitioners cite no authority for that proposition. Senator Hickenlooper, when explaining the amendment, specifically noted that it would “discourage purchases of expropriated property since the purchasers would be unable to rely automatically on the act of state doctrine and would have to establish their lack of notice of the violation of international law that took place in the seizure.” 110 Cong. Rec. 19,557 (1964). Nothing in this statement suggests that it did not apply equally to a foreign state that purchased property that had been expropriated by another foreign state.

In any event, Congress “intended that the expropriation exception to foreign sovereign immunity operate independently from the Hickenlooper Amendment’s exception to the act of state doctrine.” *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007); see 1976 House Report 20 (explaining that the FSIA’s expropriation exception “deals solely with issues of immunity” and “in no way affects existing law on the extent to which, if at all, the ‘act of state’ doctrine may be applicable”). Although the FSIA authorizes United States courts to exercise subject-matter jurisdiction over a foreign state or instrumentality that possesses property that was unlawfully expropriated, the FSIA does not itself affect the substantive liability of those foreign entities. Thus, whether the plaintiff has a valid cause of action or whether the foreign state has a valid defense, including one based on the act of state doctrine, does not affect the jurisdiction of United States courts to adjudicate those questions.

4. Petitioners apparently assumed below that (and the court of appeals therefore did not address whether) if Section 1605(a)(3) permits jurisdiction over the Foundation, it also permits jurisdiction over the Kingdom of Spain. That assumption is erroneous. If an action is one “in which rights in property taken in violation of international law are in issue,” then Section 1605(a)(3) requires either of two types of commercial activity in the United States: (i) the expropriated property must be “present in the United States in connection with a commercial activity carried on in the United States *by the foreign state*,” or (ii) the property must be “owned or operated *by an agency or instrumentality of the foreign state* and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. 1605(a)(3) (emphasis added).

Whether jurisdiction exists over the foreign state depends on which prong of Section 1605(a)(3) the plaintiff invokes. Where a plaintiff alleges that the property at issue “is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” 28 U.S.C. 1605(a)(3), then there is jurisdiction over the foreign state itself based on its own commercial activities within this country. But where a plaintiff alleges that the property is “owned or operated by an agency or instrumentality of the foreign state * * * engaged

in a commercial activity in the United States,” then there is jurisdiction over only the foreign agency or instrumentality that has availed itself of American markets, not the foreign state. *Ibid.*; cf. *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006).

Counsel for respondent has informed this Office that on remand before the district court respondent would not oppose a motion to dismiss the Kingdom of Spain from this case. Because the Foundation would still be subject to jurisdiction before the district court, and because the Foundation and Spain have a shared interest in opposing the relief that respondent seeks, it is conceivable that Spain would choose not to seek to be dismissed as a party. But the fact that Spain may not ultimately be subject to the district court’s jurisdiction— and in any event that other foreign states should not be subject to the jurisdiction of United States courts based on the possession of expropriated property by their agencies and instrumentalities—significantly diminishes the potential impact on foreign relations of the decision below.

* * * *

c. Exception for suits to confirm an arbitral award

Section 1605(a)(6) of the FSIA authorizes a suit to be brought “to confirm an award made pursuant to ... an agreement to arbitrate” that is “governed by a treaty ... in force for the United States calling for the recognition and enforcement of arbitral awards.” 28 U.S.C. § 1605(a)(6).

On February 12, 2011, at the invitation of the court, the United States submitted a brief as *amicus curiae* in a case before the U.S. Court of Appeals for the Second Circuit involving an attempt to enforce an arbitral award against the Republic of Peru, the Peruvian Ministry of Housing, Construction, and Sanitation (“the Ministry”) as well as a unit under the Ministry called the Water for Everyone Program (“the Program”). *Figueiredo v. Peru*, No. 10-0214(CON) (2d Cir. 2011). The case involved a project for drinking water and sanitation in Peru, funded by the Inter-American Development Bank (“IDB”) and administered by the Program. The plaintiff, Figueiredo, obtained an arbitral award of \$21,607,003 against the Program in a dispute over a consulting agreement. In the suit to enforce the award, Figueiredo named Peru and the Ministry, in addition to the Program, as defendants. The district court failed to expressly consider whether it had jurisdiction over Peru or the Ministry under the FSIA. Peru and the Ministry appealed the district court’s denial of their motion to dismiss.

In its *amicus* brief, the United States argued that the order denying the motion to dismiss should be vacated and the case should be remanded to the district court for a proper determination of subject matter jurisdiction over Figueiredo’s claims against Peru and the Ministry, in accordance with the FSIA. The U.S. brief explained that jurisdiction over those two defendants should be found lacking if the Program is a legally separate agency of the state. Excerpts follow from the section of the brief discussing the FSIA (with footnotes and citations to the record omitted). Chapter 15.B.1. and 15.B.4. address other sections of the U.S. brief regarding the court’s consideration of *forum non conveniens* and comity. The brief in its entirety is available at www.state.gov/s/l/c8183.htm. On December 14, 2011 the Second Circuit Court of Appeals decided the case, reversing the lower court’s decision on

other grounds without considering the question of jurisdiction under the FSIA. *Figueiredo v. Peru*, 665 F.3d 384, 389 (2d Cir. 2011) (the court explained that it was “exercising discretion to consider a [*forum non conveniens*] dismissal without first adjudicating issues of subject matter jurisdiction”).

* * * *

The only possible exception to immunity of any of the defendants in this case is § 1605(a)(6) of the FSIA, which authorizes suit “to confirm an award made pursuant to . . . an agreement to arbitrate” that is “governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards.” 28 U.S.C. § 1605(a)(6). Here, the parties agree that the award is governed by the Panama Convention. The exception in § 1605(a)(6) thus unquestionably confers subject matter jurisdiction on the district court to consider Figueiredo’s claims against the Program, which was a party to the arbitration agreement at issue in this case. However, because Peru and the Ministry were not parties to the arbitration agreement, the district court had jurisdiction over the claims against those defendants only if the Program is inseparable from the state of Peru and its Ministry. If, by contrast, the Program is a legally separate agency or instrumentality of the state, *see* 28 U.S.C. § 1603(b), there is no apparent jurisdictional basis for Figueiredo’s claims against Peru and the Ministry.

Under the FSIA, a foreign state includes a foreign state’s agencies or instrumentalities. *Id.* § 1603(a); *see id.* § 1603(b) (agency or instrumentality is a “separate legal person” that is “an organ of a foreign state” and neither “a citizen of a State of the United States . . . nor created under the laws of any third country”). However, for foreign sovereign immunity purposes, the distinction between the state itself and its agencies or instrumentalities is significant. *Garb v. Republic of Poland*, 440 F.3d 579, 590 (2d Cir. 2006) (distinction between the state and its agencies or instrumentalities “pervades the FSIA”). For example, the FSIA provides greater protections to the state itself than to a state’s agencies or instrumentalities, principally in the contexts of the availability of punitive damages and in attachment or execution proceedings. *Id.* (citing 28 U.S.C. §§ 1606, 1610(b)(2)); *see, e.g., Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (assets of an agency or instrumentality generally cannot be used to satisfy the judgments against that state). The Supreme Court has instructed that “duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.” *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (“*Bancec*”), 462 U.S. 611, 627 (1983).

The district court here erred in its analysis of the Program’s status. In considering a motion to dismiss at the pleading stage, for either failure to state a claim (Rule 12(b)(6)) or for lack of subject matter jurisdiction (Rule 12(b)(1)), courts generally accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. *See Sharkey v. Quarantillo*, 541 F.3d 75, 82-83 (2d Cir. 2008) (Rule 12(b)(1)); *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009) (Rule 12(b)(6)). However, the plaintiff “bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists.” *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quotation marks omitted). Accordingly, “[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.” *Id.* (quotation marks omitted). In determining their

jurisdiction, district courts “are permitted to look to materials outside the pleadings.” *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010).

The district court here does not appear to have placed the burden of establishing the court’s jurisdiction on the plaintiff. Instead, the district court considered whether the Program is an integral part of Peru and the Ministry under the “failure to state a claim” standard set forth in Rule 12(b)(6). Applying this erroneous standard, the district court analyzed the issue of whether the Program has a legal identity separate from Peru by “accept[ing] the material facts alleged in the complaint as true and constru[ing] all reasonable inferences in plaintiff’s favor.” The district court’s error was significant. Because it “constru[ed] all reasonable inferences in plaintiff’s favor,” the district court could well have resolved ambiguities under a Rule 12(b)(6) standard, and it may have given insufficient weight to evidence provided by Peru on critical issues such as the Program’s separate juridical status under Peruvian law, the Program’s financial independence from the Ministry, the Ministry’s obligation to pay the arbitral award, and the character of the functions performed by the Program. These are jurisdictional matters because if the Program is an agency or instrumentality of Peru rather than an inseparable part of the state, there is no apparent jurisdictional basis in the FSIA for Figueiredo’s claims against Peru or the Ministry, given that the arbitration award is against the Program alone.

This error also may have caused the district court to improperly limit the information it considered when determining whether Figueiredo’s claims against Peru and the Ministry fall within the FSIA’s arbitration exception in § 1605(a)(6). Although an analysis for failure to state a claim is limited to the pleadings and documents they incorporate by reference, *Int’l Audiotext Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 2002), an inquiry into subject matter jurisdiction requires a court to consider evidence outside the pleadings when necessary to resolve jurisdictional issues, *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998). If the district court had properly performed a subject matter jurisdiction analysis it may have required additional submissions from the parties on important factual issues regarding the function of the Program and its status as a possible agency or instrumentality.

The defendants provided some reason to believe that the Program is a separate “agency or instrumentality” of Peru under the FSIA. They showed, for example, that, as an “Executive Unit” pursuant to Peruvian law, the Program can assess and collect revenue, issue debt, incur expenses, make payments, and propose budgets, as well as enter into contracts without participation of any official outside of the Program. *See* 28 U.S.C. § 1603(b) (defining “agency or instrumentality of a foreign state” as an entity that, among other things, is “a separate legal person”)...

Ultimately, it is difficult to determine on this record whether the district court would have determined that the Program is a separate agency or instrumentality or instead an integral part of the state had it applied the correct legal standard. For that reason, the district court’s order should be vacated and the case remanded for reconsideration under the governing principles.

* * * *

...In considering whether a foreign governmental entity is a “separate legal person” under the FSIA, a court should consider the entity’s legal characteristics, such as its ability to litigate, contract, and hold property in its own name. ...

* * * *

Peru has presented reasons to believe that the Program is a separate legal person within Peru's political structure. Peru showed, for example, that its agreement with the IDB required it to establish the Program with technical, administrative, and financial independence. Peru also showed that as an "Executive Unit" pursuant to Peruvian law, the Program can assess and collect revenue, issue debt, incur expenses, and make payments, as well as enter into contracts without participation of any official outside of the Program. These are common characteristics of an "agency or instrumentality" under the FSIA rather than an inseparable part of the state, such as the role served by a military air force.

* * * *

In deciding whether the Program performs a core governmental function, the district court should consider that the Program's principal function—the provision of a basic public utility—is not invariably governmental. Nevertheless, the Program's apparently non-commercial nature is a relevant consideration. Under the core functions test, a commercial enterprise is more likely to be a separate agency or instrumentality, *see Garb*, 440 F.3d at 591, while a generally non-commercial body is more likely to be an integral part of the state. While relevant, however, the non-commercial nature of an entity is not itself determinative. Similarly, the nature of the specific activity that is the subject of suit should not be the court's primary focus in determining whether the entity being sued is the state or an agency or instrumentality of the state, as both are capable of engaging in commercial activity.

As described above, the "core functions" test is part of the determination of whether an entity is the agency or instrumentality of a state. In a separate context, the Supreme Court has applied an "alter ego" test to determine if an agency or instrumentality of a state can be liable for the state's acts, holding that it may when the entity is so controlled by the state as to create a principal-agent relationship, where corporate form has been abused, or when recognizing the putative separation between the state and the entity would work fraud or injustice. *Bancec*, 462 U.S. at 629; *Letelier*, 748 F.2d at 794. In *Bancec*, however, the governmental entity's status as an agency or instrumentality was not in dispute, and the issue was whether such an instrumentality could be held liable for the acts of its parent state, which was not a party to the litigation. Thus, as this Court has recognized, the alter ego test is "of little help" in determining "*whether* [an entity] is an instrumentality established as a juridical entity distinct and independent from the [state]." *Noga*, 361 F.3d at 685.

This Court and others have occasionally applied an alter ego test in the jurisdictional context to establish jurisdiction over one state entity based on the actions of a putatively separate entity. *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek*, 600 F.3d 171, 179-80 (2d Cir. 2010); *United States Fidelity & Guaranty Co. v. Braspetro Oil Servs Co.*, 199 F.3d 94, 98 (2d Cir. 1990); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). Under this Court's precedent, *Bancec* may be relevant to the jurisdictional inquiry in extraordinary circumstances, where respecting the juridical independence of an agency would work fraud or injustice. However, nothing in the present record appears to approach the high barrier imposed by the *Bancec* test. In particular, the district court here erred in concluding that any presumption of separateness the Program enjoys is overcome under the considerations identified in *Bancec*. The factors cited by the district court—that "final payment" of the award is the Ministry's responsibility and that the Program's budget is subject to authorization by the

Ministry of Economy and Finance—are insufficient to establish a principal-agent relationship, abuse of the corporate form, or fraud. Therefore, absent additional evidence that recognizing the Program’s separate status (if any) would be inappropriate, the “core functions” test of *Garb* is sufficient to determine the jurisdictional issue in this case.

For these reasons, this Court should vacate the district court’s order denying the defendants’ motion to dismiss, and remand for further consideration of whether the Program is an agency or instrumentality, or instead an integral part of Peru and the Ministry. If the Program is a separate agency or instrumentality, the district court will need to consider whether it had subject matter jurisdiction over the claims against Peru and the Ministry, because Figueiredo’s arbitration award is against the Program alone.

* * * *

d. Acts of terrorism

Section 1083(b) of the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”), Pub. L. No. 110-181, 122 Stat. 343, repealed 28 U.S.C. § 1605(a)(7), and § 1083(a) of the NDAA replaced it with a new exception to immunity under the FSIA relating to support of terrorism, codified at 28 U.S.C. § 1605A. Section 1083(c) of that statute contained transition rules for applying the new terrorism exception to cases pending at the time of the NDAA’s enactment. For background on the legislation and related developments, see *Digest 2008* at 457–63. During 2011, as the examples below discuss, litigation in U.S. federal courts continued to raise issues concerning the interpretation of the terrorism exception.

(1) *Roeder v. Iran*

On July 15, 2011, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court’s ruling dismissing claims against Iran brought by former hostages held at the U.S. Embassy in Tehran from 1979 to 1981. *Roeder v. Islamic Republic of Iran*, 646 F.3d 56 (D.C. Cir. 2011) (*reh’g en banc denied*, Sept. 12, 2011). As discussed in *Digest 2009* at 336–341, the United States had filed a motion to dismiss in the district court arguing that § 1083 of the NDAA did not create a cause of action for plaintiffs or expressly abrogate the Algiers Accords. For additional background on previous litigation involving the same plaintiffs (“*Roeder I*”), see *Digest 2002* at 523–27; *Digest 2003* at 537 and 547; and *Digest 2004* at 504 and 505.

The United States submitted a brief as intervenor-appellee in the court of appeals on March 9, 2011. *Roeder v. Islamic Republic of Iran*, 2011 WL 1193665 (C.A.D.C.). The U.S. brief repeated arguments, made at the district court level, that the claims were barred by the Algiers Accords and that Congress had not expressly abrogated the Algiers Accords in the 2008 NDAA. As stated in the brief’s section summarizing the argument:

Roeder I clearly identified the type of language Congress could use to unambiguously create a right of action for these plaintiffs. And Members of Congress proposed various provisions over five years that would have followed this Court’s guidance.

None were enacted. Instead, Congress recodified the terrorism exception to foreign sovereign immunity employing language nearly identical to that this Court found insufficient in *Roeder I*. It also enacted a general right of action for state sponsorship of terrorism that nowhere mentions the Algiers Accords, Iran's 1979 hostage taking, or plaintiffs' prior suits. Thus, just as in *Roeder I*, nothing in the statute Congress enacted clearly expresses Congress' intention to abrogate the Algiers Accords. In the absence of such a clear statement, this Court should affirm the district court's dismissal of plaintiffs' suit for failure to state a claim.

The Court of Appeals agreed with the United States. In its opinion, excerpted below (with most footnotes omitted), the Court affirmed the district court's dismissal, holding that Congress had not expressly abrogated the Algiers Accords, which presented a bar to plaintiffs' claims. ***

* * * *

Plaintiffs are Americans taken hostage in Iran in November 1979, and their families. The Iranians held the hostages for nearly 15 months. They were freed only when the United States and the Islamic Republic of Iran entered into the Algiers Accords. *See generally* Iran—United States: Settlement of the Hostage Crisis, 20 I.L.M. 223 (1981). In the Accords, the United States made promises to Iran in order to secure the hostages' release. One of these was a promise to bar the prosecution against Iran of any legal action by a U.S. national arising out of the hostage taking.

For the sake of clarity we will refer to plaintiffs collectively as “Roeder.” In Roeder’s last action against Iran for damages, we held that the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94–583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.), and in particular, the 2002 amendments to the Act, did not abrogate the promise made by the United States in the Algiers Accords to bar actions such as Roeder’s. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C.Cir.2003) (*Roeder I*).

Five years after we affirmed the dismissal of his suit, Roeder brought a new complaint in the district court, this time relying on Congress’s 2008 amendments to the FSIA. As in the past case, Iran did not respond, the United States intervened and filed a motion to dismiss, and the district court granted the motion. The question in this appeal is whether the 2008 amendments to the FSIA reneged on the promise of the United States in the Accords to bar Roeder’s suit.

“The FSIA provides generally that a foreign state is immune from the jurisdiction of the United States courts unless one of the exceptions listed in 28 U.S.C. § 1605(a) applies.” *Roeder I*, 333 F.3d at 235. A provision in effect when Roeder brought the last suit, but now repealed—28 U.S.C. § 1605(a)(7)(A) (2000)—stated that immunity did not apply if the foreign state had been designated a state sponsor of terrorism when the act in question occurred or as a result of the act. Iran did not meet that description. *See Roeder I*, 333 F.3d at 235. In 2001 and 2002, while *Roeder I* was pending in the district court, Congress amended the FSIA specifically to deprive Iran of immunity for acts related to Roeder’s case. *See* Pub.L. No. 107–77, § 626(c), 115

*** Editor’s note: On May 29, 2012, the Supreme Court of the United States denied the petition for certiorari in the case.

Stat. 748, 803 (2001); Pub.L. No. 107–117, Div. B, § 208, 115 Stat. 2230, 2299 (2002) (correcting scrivener’s error); *Roeder I*, 333 F.3d at 235. Even so, the Algiers Accords remained a bar to Roeder’s suit. *Roeder I*, 333 F.3d at 237. The 2001 and 2002 amendments, we held, did not provide the “clear expression” of congressional intent necessary to abrogate an executive agreement. *Id.* at 237.²

After our decision in *Roeder I*, Congress again amended the FSIA. The 2008 amendments created a generally applicable private right of action against foreign states for state sponsorship of terrorism. See 28 U.S.C. § 1605A(c) (Supp. II 2008). The amendment was a response to *Cicippio–Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C.Cir.2004), which held that the FSIA itself did not create a right of action against foreign states and that plaintiffs had to identify some other source of law (such as state law) granting them a right to recover. The 2008 amendments also reenacted, with minor changes, the provision granting the district court jurisdiction over claims related to the acts involved in Roeder’s case. See 28 U.S.C. § 1605A(a)(2)(B) (Supp. II 2008).

Roeder argues that the 2008 FSIA amendments, by creating a federal cause of action against state sponsors of terrorism, rendered our country’s commitment to bar claims like Roeder’s a nullity. As the district court pointed out, during the five years between *Roeder I* and the 2008 amendments, in the 107th, 108th, 109th, and 110th sessions of Congress, legislators tried—and failed—“to enact legislation that would explicitly abrogate the provision of the Algiers Accords barring the hostages’ suit.” *Roeder v. Islamic Republic of Iran*, 742 F.Supp.2d 1, 5 (D.D.C.2010) (quoting JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERV., SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 31 (2008), available at <http://www.fas.org/sgp/crs/terror/RL31258.pdf>). Just as in *Roeder I*, the amendments that passed “do not, on their face, say anything about the Accords.” 333 F.3d at 236. In *Roeder I* we gave an example of language that might suffice to abrogate even without an express reference to the Accords, *id.* at 237, but the 2008 amendments contain no such language or anything comparable. Nevertheless, Roeder believes that the new, general, terrorism cause of action unambiguously conflicts with the prosecution bar contained in the Algiers Accords and that the latter must necessarily give way.

The premise of Roeder’s argument is that the 2008 amendments to the FSIA permitted

² We explained this clear statement rule in *Roeder I*:

[N]either a treaty nor an executive agreement will be considered “‘abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.’” *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120, 53 S.Ct. 305, 77 L.Ed. 641 (1933)); see *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936–37 (D.C.Cir.1988). The way Congress expresses itself is through legislation.

* * *

Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress—and the President—have considered the consequences. The “requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Gregory v. Ashcroft*, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

Roeder I, 333 F.3d at 237–38 (parallel citations omitted).

him to revive his dismissed claims and invoke the new federal cause of action in 28 U.S.C. § 1605A(c) against Iran. We do not think this is so clear. Section 1605A(c) created a statutory cause of action for terrorism-related injuries against a foreign state that is a “state sponsor of terrorism” as described by 28 U.S.C. § 1605A(a)(2)(A)(i). As relevant here, this includes nations the State Department had designated sponsors of terrorism at the time of the filing of a prior, “related action” in cases “filed under [§ 1605A] by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]....” 28 U.S.C. § 1605A(a)(2)(A)(i)(II). Iran had been so designated by the time Roeder brought the last suit. But the question remains whether *Roeder I* was a “related action” within the meaning of § 1083(c)(3).

Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008—titled “Application to Pending Cases”—determines if plaintiffs in cases filed before the addition of the federal terrorism cause of action can rely on the new cause of action when filing a new action under § 1605A that would otherwise be barred by the statute of limitations in 28 U.S.C. § 1605A(b). *See* Pub. L. No. 110–181, § 1083(c), 122 Stat. 3 (codified at 28 U.S.C. § 1605A note). Subsection (c)(3) provides, “If an action arising out of an act or incident has been timely commenced under [28 U.S.C. § 1605(a)(7)], ... any other action arising out of the same act or incident may be brought under [28 U.S.C. § 1605A]” if it is commenced within 60 days of the entry of judgment in the original action or of the date of enactment of the amendments. Roeder contends that this provision, together with § 1605A(c), unambiguously gives him a cause of action to sue Iran.

Roeder I was filed under § 1605(a)(7), the prior terrorism exception to foreign sovereign immunity. Roeder’s new action duplicates the old one. Yet the related action provision of § 1083(c)(3) does not seem to contemplate that the later, related suit would be one that simply replicates the earlier action. The section speaks of “any *other* action,” and it turns on whether the new action “arises from” the same act or incident, not on whether it is identical to the prior suit or even brought by the same plaintiff. In addition, the refiling of duplicate actions is dealt with in § 1083(c)(2), but that is a provision Roeder cannot invoke because it expressly requires that the earlier action be pending at the time of the 2008 amendments. *See* National Defense Authorization Act for Fiscal Year 2008, § 1083(c)(2)(a)(iv). We mention this not because it is conclusive, but because it casts some doubt on whether § 1083(c) is as clear as Roeder makes it out to be.

The district court relied on other considerations in deciding that the 2008 amendments were not the sort of clear expression that would be needed to disregard the Accords’ bar against suit. We are content to place our decision on the district court’s analysis. The court found that § 1083(c)(3) was ambiguous regarding whether plaintiffs, such as Roeder, whose cases were not pending at the time of the 2008 amendments could rely on that provision to resurrect their actions long after they had been dismissed.

In arguing against this conclusion, Roeder points to the express pending-action requirement contained in § 1083(c)(2), which allows plaintiffs who had relied on § 1605(a)(7) as creating a cause of action to convert their claim to one under § 1605A(c). He contends that the absence of similar language in § 1083(c)(3) strongly suggests that subsection (c)(3) contains no such requirement. We do not deny the force of Roeder’s argument. In the end it may well represent the best reading of § 1083(c)(3). But our focus is not on the best reading. Legislation abrogating international agreements “must be clear to ensure that Congress—and the President—have considered the consequences.” *Roeder I*, 333 F.3d at 238. An ambiguous statute cannot supersede an international agreement if an alternative reading is fairly possible.

Animals, Inc. v. Kempthorne, 472 F.3d 872, 879 (D.C.Cir.2006). This clear statement requirement—common in other areas of federal law, *see Roeder I*, 333 F.3d at 238—“assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Gregory v. Ashcroft*, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

With respect to whether Roeder’s current suit qualifies as a related action, § 1083(c)(3) is unclear. Section 1083(c)(3) refers to “an action” that “has been timely commenced” under the FSIA’s prior terrorism exception. Roeder contends that this unambiguously refers to every action brought before the enactment of § 1083 that was timely when filed. We think, however, that the language can fairly be read to refer only to those cases timely commenced under § 1605(a)(7) that were still pending when the Act was passed. If Congress had meant to embrace more than just pending cases, it might have used the past simple, “was timely commenced.” And it might have placed § 1083(c)(3) outside of a section entitled “Application to Pending Cases.” Instead, Congress chose language suggesting that the predicate action in § 1083(c)(3) is one that *has* been commenced but *is* still ongoing. It is thus unclear whether Roeder—whose prior case was not pending and whose new case would have been time barred—could sue under § 1605A(c).

Roeder’s resort to canons of construction does not render § 1083(c)(3) any more certain. For the reasons given by the district court, we are not convinced that a pending-action requirement would make any part of § 1083(c)(3) wholly superfluous. *See Roeder*, 742 F.Supp.2d at 16. And while “it is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute and omits it from another,” *BFP v. Resolution Trust Co.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994), the strength of that presumption varies with context, *see City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Here, the relevant subsections were added at different times in the legislative process, serve different purposes and share little similar language. *Compare* H.R. 1585, 110th Cong., § 1087 (as passed by Senate, Oct. 1, 2007), *with* H.R. 1585, 110th Cong., § 1083 (as passed by Senate, Dec. 14, 2007). In these circumstances, the presumption is not of such power that it alone makes § 1083(c)(3) unambiguous.

Because of § 1083(c)(3)’s ambiguity regarding whether Roeder, whose case was not pending at the time of enactment, may file under the new terrorism cause of action, we are required again to conclude that Congress has not abrogated the Algiers Accords. We also reject Roeder’s alternative argument that the reenacted and partially revised jurisdictional provisions of the FSIA abrogate the Accords. These provisions are not meaningfully different than they were when presented to us in *Roeder I*. For the foregoing reasons, the order of the district court is *Affirmed*.

(2) *Rux v. Sudan*

On February 3, 2011, the United States Court of Appeals for the Fourth Circuit affirmed the district court’s dismissal of certain claims and dismissed as moot other claims brought against the Republic of Sudan by relatives of U.S. sailors murdered in the attack on the U.S.S. Cole. *Rux v. Sudan*, 410 Fed.Appx. 581, 2011 WL 327275 (4th Cir. 2011). As discussed in *Digest 2010* at 366-73, the United States brief filed in the appeals court had urged the

court to affirm the district court's dismissal. Also, as discussed in *Digest 2010* at 372-73, after the plaintiffs in *Rux* filed a new, related action against Sudan, the U.S. filed a supplemental brief urging the court to dismiss the appeal for lack of jurisdiction. The court's decision of February 3, 2011, excerpted below, affirmed the district court's dismissal of maritime and state law claims and dismissed the constitutional challenge to § 1083(c)(2) of the NDAA as moot.

* * * *

This appeal arises from the district court's denial of Appellants' motion for leave to supplement their complaint in an action brought against the Republic of Sudan ("Sudan") by relatives of the American sailors killed in the October 2000 terrorist bombing of the U.S.S. Cole. On November 3, 2010, we issued an Order for Supplemental Briefing directing parties to address whether any of the issues pending before this Court on appeal are rendered moot by the Appellants' filing of a new, related action pursuant to 28 U.S.C. § 1605A in the Eastern District of Virginia. Having reviewed those submissions, we find that Appellants' constitutional challenge to § 1083(c)(2) of the National Defense Authorization Act ("NDAA") for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 342-43, Section 1083(a)(1) (codified at 28 U.S.C. § 1605A (Supp. II 2008)), is no longer viable given the filing of their new action. Further, in light of Appellants' argument that their state common law claims have been preempted, we affirm the district court's dismissal of those claims.

I.

A.

The facts giving rise to this action are set forth more fully in our previous opinion, *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006) ("*Rux I*"). We briefly summarize those facts and the procedural history pertinent to the instant order. This action arises out of the October 12, 2000, bombing of the U.S.S. Cole in the Port of Aden, Yemen. Seventeen U.S. Navy sailors were killed in the attack that day, and fifty-nine surviving family members (Appellants here) brought this action against Sudan to recover for damages resulting from the sailors' deaths. Appellants alleged that the Al Qaeda terrorist organization planned and executed the U.S.S. Cole bombing, and that Sudan provided material support to Al Qaeda in the years leading up to the attack.

After initially defaulting, Sudan appeared and sought dismissal on various grounds, including sovereign immunity. We affirmed the district court's determination that Appellants had alleged sufficient jurisdictional facts to bring their case within the Foreign Sovereign Immunities Act ("FSIA") terrorism exception.). *Rux I*, 461 F.3d at 474. We declined to exercise pendent appellate jurisdiction and dismissed the remainder of Sudan's appeal. *Id.* at 476-77. On remand to the district court, Sudan made its final appearance in this case by informing the court it would "not defend or otherwise participate in this proceeding on the merits."

Appellants asserted claims under the Death on the High Seas Act ("DOHSA"), state law tort claims, and maritime wrongful death claims. ...[T]he district court found that DOHSA provided the exclusive remedy for Appellants' claims. ...

On July 25, 2007, the district court entered a final judgment, awarding eligible plaintiffs a total of \$7,956,344 plus post-judgment interest, under DOHSA. See *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 567-69 (E.D. Va. 2007) ("*Rux II*"); ... While the appeal was pending, Congress amended the FSIA through its passage of the NDAA, which created a new federal right

of action for injuries caused by acts of state-sponsored terrorism. See 28 U.S.C. § 1605A. The new right of action created by § 1605A provides for additional remedies not allowed under DOHSA, such as “economic damages, solatium, pain and suffering, and punitive damages.” *Id.* at 1605A(c).

While § 1605A allows plaintiffs to invoke the new right of action with regards to certain “pending” cases, the provision is not automatically retroactive. *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200, 203 n.1 (D.D.C. 2008). Section 1083(c) of the NDAA governs the amendment’s retroactive application. Pursuant to § 1083(c)(2) (“Prior Actions”), a plaintiff whose action was pending before the courts when the NDAA became law is given sixty days within which to “refile” his suit based upon the new cause of action, provided he meets all the requirements. Under § 1083(c)(3) (“Related Actions”), a plaintiff who had “timely commenced” a “related action” under § 1605(a)(7) may bring a new action “arising out of the same act or incident,” provided it is commenced no later than sixty days after either the enactment of the NDAA or the entry of judgment in the original suit. *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev’d on other grounds sub nom. Republic of Iraq v. Beatty*, 129 S. Ct. 2183 (2009) (interpreting new NDAA provisions).

Before reaching the merits of Appellants’ claims, this Court granted Appellants’ motion to remand the case to the district court for consideration of whether Appellants could rely on the new right of action under § 1605A. See *Rux v. Republic of Sudan*, No. 07-1835 (4th Cir. order dated July 14, 2009). While the case was before the district court on remand, Appellants filed a motion for leave to supplement their complaint, pursuant to § 1083(c)(2), in order to add claims for non-pecuniary loss under the new right of action. On December 3, 2009, the district court entered an order denying Appellants’ motion. Appellants timely appealed the order, which is the subject of the current appeal.

B.

* * * *

After the government filed its brief with the court, but before oral argument, Appellants filed a new, related action against Sudan under 28 U.S.C. § 1605A(c). See *Kumar v. The Republic of Sudan*, No. 10-cv-171 (E.D. Va. filed Apr. 15, 2010). The new action was brought by the same fifty-nine plaintiffs who are named in the case sub judice (plus two additional plaintiffs, Avinesh Kumar and Hugh Palmer, who are not parties to the action before this court). Additionally, the new action “seek[s] equivalent relief.” However, in their new action, Appellants do not rely on the conversion provision of § 1083(c)(2). In fact, Appellants expressly disavow any reliance on § 1083(c)(2) as a basis for their suit. ...

The case sub judice was argued on October 26, 2010. At argument, the government suggested that this appeal may be moot as a result of Appellants’ new action. We ordered supplemental briefing on the issue of mootness, directing the parties to address “whether any or all of the issues pending before this Court are rendered moot by the appellants’ filing of [*Kumar v. Republic of Sudan*] pursuant to 28 U.S.C. § 1605A.”

II.

Appellants maintain in their supplemental brief that their constitutional challenge to § 1083(c)(2) continues to present a live controversy. They also argue, for the first time, that their state common law claims have been preempted by § 1605A. Proceeding from that assumption, Appellants reason that the preemption of their state law claims moots their appeal from the

district court's dismissal of those claims, and that we are therefore without jurisdiction to entertain them. Moreover, they argue "the district court's opinion is manifestly incorrect" and should be vacated. Appellants' position is untenable on all counts.

Appellants' constitutional claim is premised on the contention that § 1083(c)(2)'s requirements for conversion violate Appellants' equal protection rights "by precluding them from seeking relief pursuant to § 1605A." Appellants now insist in their new, related action, that they need not rely on § 1083(c)(2) to seek relief pursuant to § 1605A, because they have a valid claim, irrespective of § 1083(c)(2), which they have brought directly under § 1605A.

Although parties are free to make arguments in the alternative, here Appellants have effectively renounced their earlier position in a manner that requires us to entertain an abstract legal question. ... This is not a traditional case of mootness, abandonment, or waiver. Its distinctiveness stems from Appellants' unusual decision to initiate a suit anchored in an expressly contrary position while this matter was pending on appeal. By bringing a new action which they previously claimed was precluded by § 1083(c)(2), and expressly disclaiming reliance on this provision, Appellants have, in effect, caused the mootness of their constitutional challenge to that provision. ...

Appellants argue that if this Court finds that the instant appeal has been rendered moot, the district court's opinion should be vacated. The relief of vacatur, however, is not a foregone conclusion—it is an equitable remedy informed by whether parties played a role in causing the mootness. ... Under these circumstances, because Appellants by their voluntary actions have caused the mootness, we do not order vacatur of the district court's judgment in this case. ... Instead, we simply dismiss Appellants' claim as moot.

Finally, in light of Appellants' argument that their state law claims have been preempted by § 1605A, we assume, without deciding, the preemption of those claims and thus affirm the district court's dismissal of them.

* * * *

3. Execution of judgments and other post-judgment actions

a. Attachment under the Terrorism Risk Insurance Act: *Martinez v. Cuba*

On August 26, 2011, the U.S. District Court for the Southern District of Florida granted the U.S. motion for summary judgment and to quash the writs of garnishment that Ms. Martinez had obtained to garnish payments owed to the government of Cuba by certain air charter companies operating flights between the United States and Cuba. *Martinez v. Cuba*, No. 10-22095 (S.D. Fla. 2011). Ms. Martinez, the ex-wife of a Cuban spy, had obtained a default judgment against the government of Cuba in 2001 in state court in Florida pursuant to § 1605(a)(7) of the FSIA. The state court awarded Martinez over \$27 million in damages based on its determination that she had been subject to torture and sexual battery. In 2010, Martinez obtained writs of garnishment from the clerk of the Florida state court providing for the garnishment of payments owed by eight U.S. air charter companies to entities in Cuba in connection with flight services authorize by the United States. The United States intervened in the case, removed it to federal court, and filed a motion for summary judgment and to quash the writs of garnishment in December 2010.

The U.S. brief in support of the motion for summary judgment argued that Martinez had not obtained a license under the Cuban Assets Control Regulations (“CACR”) to permit garnishment of the payments owed by the air charter companies, and that neither the FSIA nor the Terrorism Risk Insurance Act of 2002 (“TRIA”), P.L. No. 107-297, 116 Stat. 2322 (28 U.S.C. § 1610 note) provided a basis for garnishing the payments. The U.S. position was supported by the foreign policy interests of the United States in permitting the flights between the United States and Cuba which the Office of Foreign Assets Control (“OFAC”) had licensed pursuant to the CACR. The U.S. reply brief in support of summary judgment, filed February 9, 2011, is excerpted below (with footnotes and references to the record in the case omitted) and available at www.state.gov/s/l/c8183.htm, where the U.S. brief in support of its motion for summary judgment filed in December 2010 is also available.

* * * *

II. NEITHER THE FSIA NOR THE TRIA AUTHORIZE GARNISHMENT HERE.

There is no dispute that payments owed by the garnishees to an entity in Cuba constitute property in which Cuba or a Cuban national has an interest and are subject to the CACR. *See* 31 C.F.R. § 515.201(b). Nor can plaintiff dispute that the CACR requires a license to garnish such assets (without which the writs are null and void). *See id.* §§ 515.203(e); 515.310. The question presented is whether statutory law supplants this license requirement. Plaintiff relies on two statutory provisions in support of her garnishment action: Section 1610(f)(1)(A) of the FSIA and the TRIA. Neither statutory provision authorizes garnishment here.

A. FSIA Section 1610(f)(1)(A) Has Been Waived by the President.

Plaintiff’s lengthy contention that Section 1610(f)(1)(A) of the FSIA permits garnishment here is clearly wrong because that provision has been waived by the President. By way of background, while the FSIA creates a presumption of immunity of foreign states from the jurisdiction of U.S. Courts, *see* 28 U.S.C. § 1605(a), Congress enacted an exception to such immunity in 1996 for cases in which money damages are sought against a foreign state for personal injury or death caused by, *inter alia*, acts of torture, *see id.* § 1605(a)(7). Plaintiff obtained her judgment against Cuba pursuant to that provision. As noted, the FSIA also creates a presumption against execution on the property of a foreign state to satisfy a judgment, subject to certain exceptions set forth in Section 1610 of the statute. *See id.* § 1609. The exception relied upon by plaintiff here—Section 1610(f)(1)(A)—permits the holder of a Section 1605(a)(7) judgment to execute on “any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act.” *Id.* § 1610(f)(1)(A).

But, as plaintiff acknowledges, when Section 1610(f) was originally enacted, Congress also enacted a non-code provision that allowed the President to waive it, and Section 1610(f) was waived upon enactment by the President. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). After a dispute arose as to the scope of the President’s original waiver of Section 1610(f), Congress added language to the FSIA which clearly provides that the President “may waive any provision of paragraph (1) [of Section 1610(f)] in the interests of national security.” *See* 28 U.S.C. § 1610(g). The President again waived Section 1610(f)(1). Presidential Determination No. 2001-03, 65 Fed. Reg. 66, 483 (Oct. 28, 2000).

Plaintiff’s contention that the President’s action contravened views expressed in a committee report as to how the President should exercise his waiver authority is beside the point:

the statute clearly authorizes the President to waive Section 1610(f)(1), and that waiver forecloses plaintiff's reliance on that provision to garnish assets to satisfy her judgment. See *Young v. West Publishing Co.*, 724 F. Supp. 2d 1268, 1278 (S.D. Fl. 2010) (Moreno, C.J. affirming Torres, M.J.) ("In our circuit, '[w]hen the import of the words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.'") (quoting *United States v. Weaver*, 275 F.3d 1320, 1331 (11th Cir. 2001) and *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc)); see also *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002).

Plaintiff also contends that, in response to the President's waiver of Section 1610(f)(1), Congress enacted the TRIA, which "expressly made the President's waiver power exercisable only on an asset-by-asset basis," (citing TRIA Section 201(b)(1)), and that Congress thereby expressly stated its intent to eliminate any prior blanket waiver," (citing H.R. 107-779 at 27). This, too, is incorrect. While Section 201(b)(1) of the TRIA authorizes the President to waive attachment under the TRIA on an asset-by-asset basis, this provision does not amend Section 1610 of the FSIA, nor the President's authority to waive Section 1610(f)(1) (codified at 28 U.S.C. § 1610(g)). See TRIA, § 201(b)(1). That is, TRIA does not reinstate Section 1610(f)(1)(A)'s authorization to attach certain assets; it establishes a distinct waiver authority applicable solely to attachments governed by the TRIA itself. FSIA Section 1610(f)(1)(A) remains a "nullity" and is unavailable to authorize attachment. See *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 160-161 (D. D.C. 2009). Moreover, the Government does not rely here on a Presidential waiver of assets under the TRIA, but on the fact that the assets at issue do not fall under TRIA's definition of "blocked asset."

B. The Assets at Issue Are Not "Blocked Assets" Subject to TRIA.

Plaintiff's contention—that *all* property interests governed by the CACR are subject to a prohibition on transfer absent a license from the Office of Foreign Assets Control (OFAC) and, thus, should be considered "seized or frozen" as defined in the TRIA—was addressed and disposed of in *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 75 (S.D.N.Y. 2004). To briefly reiterate, the TRIA provides that persons who obtain judgments under FSIA Section 1605(a)(7) may execute or attach "blocked assets" of a terrorist party—defined in part as any asset "seized or frozen by the United States" pursuant to (*inter alia*) Section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. § 5(b))—the statute under which the CACR is promulgated. See TRIA § 201(d)(2)(A). Section 5(b) of the TWEA authorizes the President to do more than seize or freeze assets; it also grants authority to regulate any transfers, transactions, or dealings in the property interests of a foreign country. See 50 U.S.C. App. § 5(b)(1)(B). Transactions subject to regulation under the CACR include those incident to the provision of travel and carrier services to Cuba. See 31 C.F.R. § 515.572. While the garnishees are prohibited from providing flight services to Cuba absent authorization from OFAC, the mere regulation of such services does not mean the assets plaintiff now seeks to garnish are "seized or frozen" under the TRIA. To the contrary, as OFAC has explained, the assets at issue—payments owed to a Cuban entity—came into being after their transfer was authorized, and they have not been subject to an across-the-board prohibition on transfer.

Congress has recognized the distinction between the attachment of assets that are "*seized or frozen*" (TRIA, § 201(d)(2)(A)) and the attachment of "property with respect to which financial transactions are prohibited or *regulated*" pursuant to the TWEA (FSIA Section 1610(f)(1)(A) waived by the President). See *Weinstein*, 299 F. Supp. 2d at 74, 75. This distinction is critical here because regulation of the garnishees' carrier services and related

financial transactions to pay Cuban entities implements U.S. foreign policy to permit direct flights from the United States to Cuba for certain purposes. Under plaintiff's theory, once the transfers at issue were authorized by OFAC, they could simultaneously be halted through garnishment—foreclosing the Government's policy goals and rendering OFAC's action a nullity. Plaintiff's assertion that her garnishment action would not jeopardize authorized flights is not her judgment to make and cannot be credited. Plaintiff ultimately seeks over \$50 million to satisfy her judgment and, if her arguments are accepted, future debts owed by the garnishees would be subject to garnishment by plaintiff or other judgment creditors of Cuba—threatening the continuation of authorized flights and the destruction of the policy interests they serve.**** OFAC's determination that the authorized transfers here are not "seized or frozen" under TRIA serves significant governmental interests, is well supported by existing authority, and is entitled to deference.

* * * *

The district court judge referred the garnishment action to a magistrate judge, who issued his report and recommendation granting summary judgment and dissolving the writs of garnishment on June 27, 2011. The magistrate judge concluded that there was no dispute that the CACR required a license to garnish the assets at issue. "Absent a license from OFAC or some other statutory basis for attachment of the Garnishees' assets that supplants the CACR license requirement, Plaintiff's writs of garnishment are null and void and must be dissolved." The magistrate's report proceeded to find, in accordance with the U.S. arguments, that the repeated presidential waiver of § 1610(f)(1) rendered the FSIA unavailable as a basis for garnishment. And the magistrate agreed with the U.S. view that the payments at issue here did not meet the definition of a "blocked asset" under the TRIA. The district court judge later adopted this reasoning by the magistrate, granted the U.S. motion for summary judgment and to quash the writs of garnishment, holding that:

Plaintiff cannot satisfy the default judgment that she obtained against the Government of Cuba by garnishing payments owed by the listed air charter companies. Since Plaintiff does not have the required license from the United States Department of Treasury's Office of Foreign Assets Control, the writs of garnishment are null and void. Furthermore, in this case, neither the Foreign Sovereign Immunity Act nor the Terrorism Risk Insurance Act authorizes garnishment.

Martinez appealed the district court's decision to the U.S. Court of Appeals for the Eleventh Circuit. But she subsequently voluntarily dismissed her appeal.

b. Attachment under the FSIA

(1) NML Capital v. Spaceport Systems

**** Editor's note: See Chapter 16.A.6.e(1) for a discussion of revisions to the Cuban Asset Control Regulations in 2011 that expanded opportunities for travel to Cuba.

See Section A.2.a.(1), *supra*, for discussion of this case considering whether Argentina's contribution to a satellite for measuring ocean salinity was immune from attachment because the satellite was not being used for commercial purposes, among other reasons.

(2) Presumption of immunity for foreign state property: *Rubin v. Iran*

On March 29, 2011, the U.S. Court of Appeals for the Seventh Circuit reversed the district court and agreed with the views of the United States government in its 2009 *amicus* brief, holding that property of the Islamic Republic of Iran was presumed immune under the FSIA. *Rubin v. Islamic Republic of Iran*, 637 F.3d. 783 (7th Cir. 2011) (reh'g denied June 6, 2011). The U.S. brief in the case is discussed in *Digest 2009* at 352-53, 361-62. The plaintiffs in the case had attempted to attach Iranian-owned art and artifacts held by Chicago museums. The attachment proceedings were an effort to satisfy default judgments plaintiffs had obtained against Iran awarding compensation for injuries from a 1997 terrorist attack by Hamas—an attack carried out with Iranian material support. The district court held that immunity from attachment was an affirmative defense that had to be pleaded by defendant. When Iran appeared to assert attachment immunity, the plaintiffs made a broad discovery request against Iran to identify additional property for attachment. The district court granted the request. The Seventh Circuit reversed both the district court order granting discovery and the order requiring Iran to appear and affirmatively plead attachment immunity. The court's opinion is excerpted below with most footnotes omitted.

* * * *

1. The general-asset discovery order

* * * *

Th[e district court's] approach is inconsistent with the presumptive immunity of foreign-state property under § 1609. As a historical matter, “[p]rior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments. This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State.” *Autotech [Techs. LP v. Integral Research & Dev. Corp.]*, 499 F.3d 737, 749 (7th Cir. 2007). The FSIA “codified this practice by establishing a general principle of immunity for foreign sovereigns from execution of judgments,” subject to certain limited exceptions. *Id.* The statutory scheme thus “modified the rule barring execution against a foreign state’s property by ‘partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity.’ ” *Id.* (second emphasis omitted) (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir.2002)).

Importantly here, the exceptions to attachment immunity are narrower than the exceptions to jurisdictional immunity: “Although there is some overlap between the exceptions to jurisdictional immunity and those for immunity from execution and attachment, there is no escaping the fact that the latter are more narrowly drawn.” *Id.* We noted in *Autotech* that “[t]he FSIA says that immunity from execution is waived only for specific ‘property.’ As a result, in order to determine whether immunity from execution or attachment has been waived, the plaintiff must identify specific property upon which it is trying to act.” *Id.* at 750. Under the

FSIA “[t]he only way the court can decide whether it is proper to issue the writ [of attachment or execution] is if it knows which property is targeted.” *Id.* In other words, “[a] court cannot give a party a blank check when a foreign sovereign is involved.” *Id.*

* * * *

There is no question that the attachment immunity codified in § 1609 of the FSIA has a cost, and that cost is borne primarily by Americans who have been injured in tort or contract by foreign states or their agencies or instrumentalities. The FSIA embodies a judgment that our nation’s foreign-policy interests justify this particular allocation of legal burdens and benefits. Accordingly, we conclude that under the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified. The general-asset discovery order issued in this case is incompatible with the FSIA.¹⁴

2. *The appearance order*

The foregoing discussion also highlights the flaws in the district court’s earlier order in which the court held that attachment immunity under § 1609 is an affirmative defense that can only be asserted by the foreign state itself. This ruling fails to give effect to the statutory text: “[T]he property in the United States of a foreign state *shall* be immune from attachment arrest and execution *except* as provided in sections 1610 and 1611 of this chapter.” 28 U.S.C. § 1609 (emphasis added). As we have explained, the statute cloaks the foreign sovereign’s property with a presumption of immunity from attachment and execution unless an exception applies; under § 1609 *the property* is protected by immunity and may not be attached absent proof of an exception. It follows from this language that the immunity does not depend on the foreign state’s appearance in the case. The immunity inheres in the property itself, and the court must address it regardless of whether the foreign state appears and asserts it.

Again, we can find helpful analogous principles in the operation of § 1604 jurisdictional immunity. The Supreme Court has confirmed that the FSIA’s immunity from suit arises presumptively, and “even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act.” *Verlinden* [*Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)], 461 U.S. at 493–94 & n. 20, 103 S.Ct. 1962. This conclusion is unsurprising; the immunity conferred by § 1604 is jurisdictional. The Court in *Verlinden* read § 1604 together with a separate provision of the FSIA, codified at 28 U.S.C. § 1330(a), which provides:

The district courts shall have original jurisdiction ... of any ... action against a foreign state as defined in section 1603(a) of this title as to any claim for relief ... to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or any applicable international agreement.

28 U.S.C. § 1330(a); *Verlinden*, 461 U.S. at 493–94, 103 S.Ct. 1962.

Though not jurisdictional, the immunity conferred by § 1609 is similarly a default presumption, one that inheres in the property of the foreign state. When a judgment creditor seeks to attach property to satisfy a judgment obtained under the FSIA, the district court is

¹⁴ In light of this holding, we need not consider Iran’s alternative argument that the general-asset discovery order violates the Algiers Accords, 20 I.L.M. 224 (1981).

immediately on notice that the immunity protections of § 1609 are in play. In particular, where the plaintiff seeks to attach property of the foreign state *itself*, immunity is presumed and the court must find an exception—with or without an appearance by the foreign state—not as a jurisdictional matter but to give effect to the statutory scheme. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 460 cmt. b (explaining the distinction in the FSIA between the property of foreign states and the property of foreign-state instrumentalities).

This reading of § 1609 is confirmed by several provisions in § 1610 governing exceptions to attachment immunity. For example, § 1610(a)(1) states that § 1609 immunity does not apply where “the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication.” This strongly suggests that immunity from execution is presumed and waiver of immunity is the exception. Section 1610(c) is even more telling. That provision governs the issuance of an attachment order under either § 1610(a) or (b) when the foreign state is in default:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [governing service, time to answer, and default].

28 U.S.C. § 1610(c). The waiting period required by § 1610(c) ensures that a defaulting foreign state is provided adequate notice before an attachment order issued under either § 1610(a) or (b)—the “commercial” exceptions to § 1609 immunity—will take effect. This provision makes it clear that even when the foreign state fails to appear in the execution proceeding, the court must determine that the property sought to be attached is excepted from immunity under § 1610(a) or (b) before it can order attachment or execution.

Our conclusion that the court must address § 1609 immunity even in the absence of an appearance by the foreign state is also consistent with the common-law practice that the FSIA codified. As we have explained, the attachment immunity of foreign-state property, like the jurisdictional immunity of foreign states, was historically determined without regard to the foreign state’s appearance in the case. The court either deferred to the State Department’s suggestion of immunity or made the immunity determination itself, by reference to the State Department’s established policy regarding foreign-sovereign immunity. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (common-law doctrine of foreign-sovereign immunity required judicial deference to executive determinations of immunity because “[t]he judicial seizure” of the property of a foreign state may be regarded as “an affront to its dignity and may ... affect our relations with it”). This practice continued after the issuance of the Tate Letter and the State Department’s shift to the restrictive theory of foreign-sovereign immunity.

To date, two circuits have addressed whether the foreign state must appear and assert § 1609 attachment immunity, and both have concluded that the answer is “no.” In the most recent case, the Peterson plaintiffs (who have intervened here) sought to execute their judgment against certain Iranian receivables; the Ninth Circuit concluded that the district court must independently raise and decide whether the property is immune from attachment under § 1609. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126–28 (9th Cir.2010). Similarly, the Fifth Circuit has held that “the [foreign state’s] presence is irrelevant” to the question whether the property the plaintiff seeks to attach is excepted from § 1609’s presumptive immunity.

Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229, 233 (5th Cir.2004). A district court in Massachusetts also agrees. *See Rubin v. Islamic Republic of Iran*, 456 F.Supp.2d 228, 231-32 (D.Mass.2006) (execution proceeding brought by the Rubin plaintiffs to attach property in the possession of a museum at Harvard University but alleged to belong to Iran).

We now join these courts in concluding that under § 1609 of the FSIA, the property of a foreign state in the United States is presumed immune from attachment and execution. The immunity inheres in the property and does not depend on an appearance and special pleading by the foreign state itself. The party in possession of the property may raise the immunity or the court may address it sua sponte. Either way, the court must independently satisfy itself that an exception to § 1609 immunity applies before ordering attachment or other execution on foreign-state property in the United States.

* * * *

(3) Bank accounts and premises of permanent mission to the UN

In August of 2011, the United States filed a statement of interest in a case against the Republic of Congo's Permanent Mission to the UN ("the Mission") and other defendants in the U.S. District Court for the Eastern District of New York. *Avelar v. J. Cotoia Construction Inc.* 11-02172 (E.D.N.Y.). This case had been removed to federal court after a New York state court had entered a default judgment against the Mission for injuries allegedly sustained by a construction worker who had been working on the ambassador's residence. The plaintiff had secured a freeze on the Mission's bank accounts and liens on the Mission premises and the ambassador's property. In the section of the statement of interest excerpted below, the United States asserted immunity from execution for the Mission's property (footnotes and citations to the record have been omitted). The section of the statement of interest relating to service of process is excerpted in section 5.a. *infra*. The statement of interest in its entirety is available at www.state.gov/s/l/c8183.htm.

* * * *

C. Under the United States' International Agreements, the Diplomatic Property of the Congo's U.N. Mission Is Immune From Attachment or Execution.

Plaintiff, through counsel, has represented to the Court that he has filed liens against the Mission's office and the official residence of Ambassador Balé as part of his efforts to enforce the default judgment he obtained against the Congo's U.N. Mission. The Vienna Convention provides that the premises of diplomatic missions "shall be immune from . . . attachment or execution." Vienna Convention art. 22.3. As such, Plaintiff is foreclosed from attempting to execute on or enforce any liens that he has filed against the Mission's office or Ambassador Balé's official residence, both of which are clearly part of the premises of the Congo's U.N. Mission that enjoy immunity from attachment and execution under the Headquarters Agreement and the U.N. Convention, which render the provisions of the Vienna Convention applicable to permanent missions to the United Nations. *See id.* art. 1(i); *cf.* 767 Third Avenue Assocs., 988 F.2d at 297-98.

In addition, bank accounts belonging to the Congo's U.N. Mission that are used for Mission purposes are also protected from attachment and execution. The United States is obligated under the U.N. Charter to provide U.N. diplomatic missions with "such privileges and immunities as are necessary for the independent exercise of [its] functions in connection with the [United Nations]." U.N. Charter art. 105, para. 2. The Vienna Convention also obligates the United States to accord diplomatic missions with "full facilities for the performance of the functions of the mission." Vienna Convention art. 25.

Courts have drawn on these international agreements to recognize that diplomatic missions' bank accounts that are used for purposes of the mission are immune from attachment. In *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987), the court relied on Article 25 of the Vienna Convention to grant Liberia's motion to quash the writs of attachment seizing its embassy's bank accounts. The court found that "[t]he Liberian Embassy [would] lack[] the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission." Similarly, in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761 (S.D.N.Y. 1992), a personal-injury plaintiff obtained a default judgment against Uganda's U.N. Mission, which she sought to satisfy by a writ of execution against that mission's bank account. Granting Uganda's motion to vacate the writ of execution, the court held that "attachment of defendant's bank account is in violation of the United Nations Charter and the Vienna Convention because it would force defendant to cease operations." *Id.* at 763. See also *Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes." (citing *Foxworth*, 796 F. Supp. 761, and *Liberian Eastern Timber Corp.*, 659 F. Supp. 606)).

In each of the cases cited above, the head of the diplomatic mission submitted an affidavit stating that the bank accounts at issue were used for the functioning of the mission. Here, too, Ambassador Balé has filed with this Court a signed declaration stating that the Mission's bank accounts that have been attached "are used for embassy-related and diplomatic purposes." Such a declaration has been held to be a sufficient basis for a court to find that bank accounts are "official bank accounts used or intended to be used for purposes of the diplomatic mission." *Liberian Eastern Timber Corp.*, 659 F. Supp. at 608. For the United States to be in compliance with its obligations under these international agreements, such bank accounts must be accorded diplomatic immunity from attachment.

The attachment of foreign mission property implicates important foreign policy interests of the United States. In view of the vital governmental functions of foreign missions, it is imperative that they have the means to sustain their operations in the United States, which requires access to official bank accounts used for mission purposes. The attachment of a mission's bank account or execution on the premises of the mission may adversely affect the United States' relationships with foreign states. Furthermore, such actions may make it more difficult for the United States to enlist the assistance of the foreign government when private parties attempt to attach U.S. bank accounts and other assets abroad. In order to vindicate the United States' interests in maintaining relationships with foreign governments, the Court should ensure that the Congo's U.N. Mission and its bank accounts are accorded the full protections to which they are entitled under international agreements.

* * * *

The court issued its opinion in November, dismissing the case in its entirety and finding that the attachments were prohibited by the FSIA. *Avelar v. Cotoia Construction*, 2011 WL 5245206 (E.D.N.Y. 2011). Excerpts follow from the section of the court's opinion discussing immunity of mission premises and bank accounts. The court's discussion of propriety of service under the FSIA is excerpted in section 5.a. *infra*.

* * * *

... [T]he Court nonetheless is constrained to vacate plaintiff's execution of the default judgment against Congo Mission premises and bank accounts, because those assets are immune from execution and levy. The Vienna Convention on Diplomatic Relations ("Vienna Convention") applies with equal force to missions accredited to the United Nations and the United States, with respect to immunity against execution and levy of mission assets. *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire*, 988 F.2d 295, 297 (2d Cir.1993); see Vienna Convention, arts. 22, 25, Apr. 18, 1961, 23 U.S.T. 3227; see also U.N. Charter art. 105, para. 2; Agreement Regarding the Headquarters of the United Nations, U.S.-U.N., art. V para. 4, June 26, 1947—Nov. 21, 1947, T.I.A. S. No. 1676; Convention on Privileges and Immunities of the United Nations, art. IV § 11, Feb. 13, 1946, 21 U.S.T. 1418.

Pursuant to Article 22 of the Vienna Convention, mission premises are "inviolable," and "[t]he premises of the mission, their furnishings and other property thereon ... shall be immune from search, requisition, attachment or execution." Vienna Convention, *supra*, art. 22 §§ 1, 3. The "premises of the mission" means "buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission." *Id.* art. 1(i); see *767 Third Ave. Assocs.*, 988 F.2d at 298. Moreover, under Article 25 of the Vienna Convention, the United States is to "accord full facilities for the performance of the functions of the mission." Bank accounts used by the mission for diplomatic purposes are immune from execution under this provision, as facilities necessary for the mission to function. *Sales v. Republic of Uganda*, No. 90-CV-3972 (CSH), 1993 WL 437762, at *2 (S.D.N.Y. Oct.23, 1993); *Foxworth v. Permanent Mission of Republic of Uganda*, 796 F.Supp. 761, 763 (S.D.N.Y.1992); *Liber. E. Timber Corp. v. Gov't of Republic of Liber.*, 659 F.Supp. 606, 608 (D.D.C.1987). A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes. See *Sales*, 1993 WL 437762, at *2 (noting also that, to remain consistent with principles of sovereign immunity, reliance on the mission head's affidavit is necessary to avoid "painstaking examination of the Mission's budget and books of account"); *Foxworth*, 796 F.Supp. at 762; *Liber. E. Timber Corp.*, 659 F.Supp. at 610.

In the case at bar, plaintiff has levied and executed against Congo Mission bank accounts at Citibank, as well as Congo Mission premises and the home of Ambassador Balé. Ambassador Balé has submitted sworn affidavits stating that the bank accounts and properties are vital to operation of the Congo Mission, describing the specific mission-related uses to which the accounts and properties are put, and detailing the fruitless steps the Congo Mission has taken to arrange alternate financing through its country's department of finance. ... Ambassador Balé's sworn statements are sufficient to establish that the assets against which plaintiff has enforced

the state court default judgment are used for diplomatic purposes, and necessary for Congo Mission to function, and the Court therefore finds that they are immune from levy and attachment. *See Sales*, 1993 WL 437762, at *2; *Foxworth*, 796 F.Supp. at 762; *Liber. E. Timber Corp.*, 659 F.Supp. at 610. For these reasons, Congo Mission's motion to vacate all liens, levies, restraints, attachments, and similar enforcement mechanisms plaintiff has undertaken to enforce his default judgment, is GRANTED.

* * * *

(4) *Assets of foreign central banks*

On July 5, 2011, the U.S. Court of Appeals for the Second Circuit decided the case, *NML Capital Ltd. v. Republic of Argentina*, 652 F.3d 172 (2d Cir. 2011), discussed in *Digest 2010* at 384-91 (presenting excerpts of the U.S. *amicus* brief). See also *Digest 2007* at 494-504 for discussion of an earlier case involving prior efforts by the same plaintiffs to attach funds held by the same defendants. The court again held that the funds of Banco Central de la República ("BCRA") at the Federal Reserve Bank of New York ("FRBNY") were immune from attachment under the FSIA, this time interpreting Section 1611(b)(1) of the FSIA, which provides:

Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

Plaintiffs' second attempt to attach the funds was premised on the theory, based on *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), that if a foreign central bank was acting as the "alter ego" of the foreign government, its assets could be attached as if they were assets of the government. After the initial determination that the more recent case brought by the plaintiffs was not barred by the doctrines of claim preclusion or issue preclusion because it presented different legal and factual issues, the court turned to an analysis of the claim under § 1611(b)(1). Most footnotes and citations have been omitted from the excerpts of the court's opinion that follow.

* * * *

The District Court's holding was predicated on the conclusion that immunity under § 1611(b)(1) is dependent on a central bank's independence. That is, if a central bank lacks sufficient independence to preserve the presumption of juridical separateness under *Bancec*, our analysis

under the FSIA must, according to plaintiffs, “stop at [§] 1610,” ... because the property of the Republic in the present matter is not entitled to the immunity conferred in § 1611(b)(1). As a result, after “disregarding the formal separateness of the Republic and BCRA and treating the [FRBNY Funds] in the hands of BCRA . . . as the funds of the Republic,” *EM Ltd.*, 720 F. Supp. 2d at 302, the District Court determined under § 1610 that (1) the Republic had “made the requisite waivers of immunity as to *its* property . . . [which] includ[es] the [FRBNY Funds],” *id.* at 302 (emphasis supplied); and (2) the FRBNY Funds should be considered “property [of the Republic] used for commercial activity in the United States,” *id.* at 303. The District Court declined to conduct an analysis of the FRBNY Funds’ immunity under § 1611 because “the [FRBNY Funds were] in fact not the property of BCRA held for its own account, but [were] the property of the Republic.” *Id.* at 304.

We think that the District Court misread the FSIA when it concluded that a court facing the question of whether the assets of a central bank are attachable property under the FSIA must first decide whether the central bank is entitled to the presumption of independence from its parent state under *Bancec*. We hold that the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state pursuant to *Bancec*. If foreign central bank property is immune from attachment under § 1611(b)(1), the fact that “a relationship of principal and agent [has been] created” between the foreign state and its central bank under *Bancec* is irrelevant, *see Bancec*, 462 U.S. at 629. As discussed below, foreign central banks are not treated as generic “agencies and instrumentalities” of a foreign state under the FSIA; they are given “special protections” befitting the particular sovereign interest in preventing the attachment and execution of central bank property. *EM I*, 473 F.3d at 485. Plaintiffs cannot evade this statutory requirement by using *Bancec* to turn assets that would otherwise be considered property of a central bank held for its own account into property of the Republic that is not entitled to immunity.

* * * *

First, the text of the statute provides that the only qualification for immunity under § 1611(b)(1) is whether the property of the central bank is “held for its own account.” We are mindful that in interpreting the statute we must “give effect to Congress’s choice of words, and understand that the text, as written,” does not create an independence requirement for the immunity of central bank assets under the FSIA. *United States v. Wilson*, 503 U.S. 329, 342, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992)....

Second, the plain language of the statute suggests that Congress recognized that the property of a central bank, immune under § 1611, might *also* be the property of that central bank’s parent state. As the United States, appearing as *amicus curiae*, observes, “if Congress had intended to limit § 1611(b)(1) to independent central banks, one would have expected the introductory language of the subsection—‘Notwithstanding the provisions of section 1610 of this chapter’—to refer only to § 1610(b), which provides for execution or attachment of the property of state agencies and instrumentalities, rather than to § 1610 as a whole.” *United States Amicus Br.* 6-7. But § 1611(b)(1) refers to § 1610 in its entirety—including those provisions of § 1610 applicable only to foreign states. Therefore, the statute seems to anticipate the possibility that property held by the central bank may also be property of the sovereign state.

... In the House Report on the FSIA, upon which we relied in *EM I*, Congress explained that

Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and “held” for the bank’s or authority’s “own account”—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems. FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630. ...

The FSIA House Report reflects Congress’s understanding that while the “funds of [] foreign central banks” are managed through those banks’ accounts in the United States, those funds are, in fact, “the reserves of [the] foreign state[s]” themselves. FSIA House Report 31, *as reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630. In other words, the property of central banks deserves protection notwithstanding the fact that central banks may not have separate legal personhood. “By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.” *See* United States *Amicus* Br. 8.

(b) Historical Context

Perhaps most convincingly, the historical backdrop against which the FSIA was passed forecloses the argument that a determination of agency liability under *Bancec* can render property attachable that is otherwise immune under § 1611(b)(1). As *plaintiffs’* expert observes, “[t]wenty years ago . . . most central banks in the world functioned as departments of ministries of finance[,]” in which “the level of actual independence . . . was usually lower than indicated in the law.” ...

Accordingly, when Congress passed the FSIA, it had no reason to believe that foreign central banks and monetary authorities would be independent of their parent states because, at that time, most were not. Moreover, Congress had reason to suspect that, as appears to be the case with Argentina, a central bank’s actual degree of autonomy may not be entirely predictable based on its degree of juridical independence. In an environment in which Congress was worried that execution against foreign central bank deposits might “discourage[]” foreign states from depositing their reserves in the United States, *see* FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630; *see also EM I*, 473 F.3d at 473, it makes no sense to assume that Congress would enact a statute designed to prevent “significant foreign relations problems” which failed to immunize a significant portion of the central bank reserves in the United States at that time. *Id.*

* * * *

We therefore conclude that § 1611(b)(1) immunizes foreign central bank property “held for its own account” without regard to the central bank’s independence from its parent state; that is, we hold that the analysis of the immunity of a foreign central bank’s property *begins* with § 1611(b)(1). There is no indication in the text, history, or structure of the FSIA that Congress intended to make the immunity of a central bank’s property contingent on the independence of

the central bank. The statute makes no reference to the independence or autonomy of a central bank or monetary authority. Moreover, the history of the FSIA and of the independence of central banks suggests that Congress understood the property of a foreign central bank to be deserving of immunity regardless of that bank's independence. Plaintiffs fail to convince us that an independence requirement can be fairly read into the statute.

(iv)

Having concluded that the immunity of the FRBNY Funds under the FSIA turns not on whether the BCRA is entitled to a presumption of independence from the Republic under *Bancec*, but on whether the funds are property of the BCRA "held for its own account" under § 1611(b)(1), we must now decide whether the FRBNY Funds meet that test.

The definition of the phrase "held for its own account" in § 1611(b)(1) is a matter of first impression in this Circuit. *See EM I*, 473 F.3d at 485 (declining to "decide which interpretation of § 1611(b)(1)'s 'held for its own account' language is correct"). The parties and *amici* propose three competing definitions.

First, BCRA argues that central bank property is "held for its own account" if that property is used for "traditional central banking activities." ... This appears to be the test adopted by Congress in the FSIA, *see* FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. at 6630 ... and apparently is the only test ever to be applied by a federal court in this country. *See, e.g., Ministry of Def. & Support for Armed Forces of Islamic Repub. of Iran v. Cubic Def. Sys.*, 385 F.3d 1206, 1223-24 (9th Cir. 2004) ... *vacated on other grounds sub nom., Ministry of Def. & Support for Armed Forces of Islamic Repub. of Iran v. Elahi*, 546 U.S. 450, 126 S. Ct. 1193, 163 L. Ed. 2d 1047 (2006); *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 46 F. Supp. 2d 231, 239 (S.D.N.Y. 1999) ... *vacated on other grounds*, 273 F.3d 241 (2d Cir. 2001); *Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C.*, 919 F. Supp. 13, 17 (D.D.C. 1994) (citing FSIA House Report); *Banque Compafina v. Banco de Guatemala*, 583 F. Supp. 320, 322 (S.D.N.Y. 1984) (same).

A second proposed definition of central bank property "held for its own account" is offered by the FRBNY, appearing as *amicus curiae*. FRBNY suggests an alternative definition drawn from the common law of bank deposits. ... Under the so-called "plain language test," property of a central bank is "held for its own account" if it is in an account in the central bank's name because "[u]nder fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor" and no one else. ...

Finally, relying on a "grammatical and syntactical construction of *Section 1611(b)*," plaintiffs suggest a third definition of property of a central bank "held for its account": "[p]roperty of a central bank is 'held for its own account' when it is held for [the central bank's] own profit or advantage." ... Drawing on this definition, plaintiffs argue that if, pursuant to *Bancec*, a court were to disregard the juridical separateness of BCRA, the FRBNY Funds "cannot be held for the central bank's *own* profit or advantage" because the central bank "is the sovereign." ...

Plaintiffs' definition is novel but cannot be correct. BCRA is charged by statute with power and responsibility over, among other things, issuing and monitoring the stability of the Argentine peso, establishing and implementing monetary policy, investing reserves, acting as the Republic's financial agent and as depository and agent for the Republic before "international monetary, banking and financial entities," and regulating the Argentine banking system and financial sector. ... These are all traditional activities of central banks. ... They are also, to a one,

functions which defy any attempt to divide the interest of the central bank from that of the state it serves.

* * * *

On the other hand, the “central banking activities” test is not without difficulty, either. On its face, the House Report “distinguish[es]” between property “used or held in connection with central banking activities,” which is immune from attachment under § 1611(b)(1), and that used “solely to finance the commercial transactions . . . of foreign states,” which is not. FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. at 6630. However, the structure of the FSIA suggests that property used for commercial activity and property of a central bank held for its own account are not mutually exclusive categories, because some property of a central bank held for its own account *is* a category of property used for commercial activity. . . .

In order to resolve this tension, one practitioner of central banking law has proposed a modified central bank functions test, pursuant to which “property of a central bank is immune from attachment if the central bank uses such property for central banking functions as such functions are normally understood, irrespective of their commercial nature.” Patrikis, *Foreign Central Bank Property*, 1982 U. Ill. L. Rev. at 277. Conversely, “if an activity is to be regarded as commercial, as distinguished from a central bank activity, it should be an activity of the foreign central bank not generally regarded as a central banking activity.” *Id.* at 277-78. This test was adopted by the district court in *Weston*, see 823 F. Supp. at 1113, and, more recently, by another district court in *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001) (“If the funds at issue are used for central bank functions as these are normally understood, then they are immune from attachment, even if used for commercial purposes.”).

We think that this modified test—which combines the “plain language” of the statute and “central bank activities” tests as conjunctive requirements—accords with the text and purpose of § 1611(b)(1), and we therefore adopt this test for purposes of determining whether central bank property is “held for its own account.” Where funds are held in an account in the name of a central bank or monetary authority, the funds are presumed to be immune from attachment under § 1611(b)(1). This presumption is consistent with the recognition that “FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation.” *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); see also *EM I*, 473 F.3d at 486 (district courts must calibrate the “ ‘delicate balancing between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign’s or sovereign agency’s legitimate claim to immunity from discovery’ ”) (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (quotation marks omitted))). A plaintiff, however, can rebut that presumption by demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood, irrespective of their “commercial” nature.

Had the District Court applied this test, it would have concluded that the FRBNY Funds were property of the BCRA held for the central bank’s own account at FRBNY. We have already established that the FRBNY Funds are held in BCRA’s name at FRBNY. See *EM I*, 473 F.3d at 473 (“[T]he FRBNY Funds that plaintiffs seek to attach are held in BCRA’s name.”). Pursuant to the parties’ March 2009 Stipulation, the FRBNY Funds of December 30, 2005 are said to have been derived from four types of transactions conducted by BCRA: (1) \$31 million was transferred into the FRBNY account in order to pay Argentine banks that sought to reduce the

amount of their U.S. dollar reserves; (2) \$32.2 million was transferred into the account because certain Argentine banks were increasing their U.S. dollar reserves; (3) BCRA had purchased approximately \$35 million in U.S. dollars throughout the day in order to control its currency; and (4) \$1.2 million was deposited pursuant to a regulatory exchange rule that BCRA imposed on Argentine exporters. *See EM Ltd.*, 720 F. Supp. 2d at 303. The record clearly establishes that the accumulation of foreign exchange reserves to facilitate the regulation of the peso and the custody of cash reserves of commercial banks pursuant to central bank regulations are paradigmatic central banking functions. ...

(v)

Having concluded that the FRBNY Funds are property of the BCRA “held for its own account,” the final question under § 1611(b)(1) is whether there has been an effective waiver of immunity with respect to that property.

Section 1611(b)(1) provides that the only exception to the immunity for property of a central bank or monetary authority held for its own account is where “such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution.” 28 U.S.C. § 1611(b)(1).

The District Court concluded that the Republic had explicitly waived *its* immunity. *See EM Ltd.*, 720 F. Supp. 2d at 301. The terms and conditions governing the bonds provide that— with regard to any potential immunity from attachment and execution of the Republic’s property—“the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment.”...

However, the District Court also concluded that “there has been no waiver of immunity with respect to BCRA.” *EM Ltd.*, 720 F. Supp. 2d at 297 (emphasis supplied). We agree. Waiver under the FSIA must be “clear and unambiguous.” *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010). In circumstances in which we have recognized the waiver of immunity with respect to an agency or instrumentality of a foreign state, that waiver has specifically embraced the foreign state *and* the relevant agency or instrumentality. *See, e.g., LNC Invs., Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358, 361 (S.D.N.Y. 2000), *aff’d sub nom., LNC Invs., Inc. v. Banco Central de Nicaragua*, 228 F.3d 423 (2d Cir. 2000) (waiving immunity “[t]o the extent that the Republic or any Governmental Agency has or hereafter may acquire any immunity from jurisdiction of any court”).

Here, while the Republic waived immunity under the FSIA for “the Republic or any of its revenues, assets or property,” the Republic’s waiver did not mention the “instrumentalities” of the Republic or BCRA in particular, much less BCRA’s reserves at FRBNY. As we previously observed, “although the Republic’s waiver of immunity from attachment is worded broadly, it does not appear to clearly and unambiguously waive BCRA’s immunity from attachment, as it must do in order to be effective.” *EM I*, 473 F.3d at 485 n.22.

* * * *

Because BCRA’s sovereign immunity over the FRBNY Funds has not been waived and the FRBNY Funds are property of BCRA held for its own account under 28 U.S.C. § 1611(b)(1), we hold that the FRBNY Funds are immune from attachment and restraint. The District Court therefore erred in concluding that it had subject-matter jurisdiction to adjudicate a suit for

attachment and restraint of the FRBNY Funds. The April 7, 2010 opinion and all associated orders of the District Court are vacated and the cause is remanded to the District Court for further proceedings consistent with this opinion.

* * * *

4. Availability of contempt sanctions

On March 15, 2011, the U.S. Court of Appeals for the District of Columbia Circuit decided that contempt sanctions against a foreign government were properly imposed by the district court in a case under the FSIA. *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). Hemisphere sought to enforce two arbitral awards for delinquent payments on its credit agreement with the Democratic Republic of Congo (“DRC”) in 2004. The district court entered two default judgments after the DRC failed to appear. Hemisphere then sought to execute on the judgments. The DRC appeared in the enforcement proceedings, but failed to respond to discovery requests relating to property available for execution. See *Digest 2006* at 621-26 for a discussion of the court’s prior consideration of the availability of diplomatic properties for execution in the case. In 2009, two years after the district court ordered the DRC to produce a certain category of documents in response to its discovery plan, the court found the DRC in civil contempt for failing to comply. The DRC moved to vacate the contempt order, relying on the U.S. *amicus* brief in a Fifth Circuit case, *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006) (discussed in *Digest 2006* at 603-11), in which the court found that contempt sanctions were not appropriate under the FSIA. The U.S. also filed an *amicus* brief in the D.C. Circuit asserting that contempt sanctions were improper.

The D.C. Circuit disagreed with the Fifth Circuit and the U.S. position and concluded that an order imposing sanctions was appropriate, even if such an order could not be enforced or executed. Excerpts of the court’s opinion follow (footnotes and citations to the record omitted). For the court’s treatment of the comity arguments presented by the U.S., see Chapter 15.B.4.

* * * *

The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution. See *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984) (plaintiff may hold a right without a remedy under the FSIA). Otherwise a plaintiff must rely on the government’s diplomatic efforts, or a foreign sovereign’s generosity, to satisfy a judgment. Therefore, it is not anomalous to divide, as Hemisphere does, the question of a court’s power to impose sanctions from the question of a court’s ability to enforce that judgment through execution. Hemisphere’s contention that whether the court can enforce its contempt sanction is irrelevant to the availability of a contempt order is consistent with the statutory scheme.

* * * *

As the Seventh Circuit has recognized, there is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court's inherent contempt power. *Autotech Techs. v. Integral Research & Dev.*, 499 F.3d 737, 744 (7th Cir. 2007). Nor is there any legislative history supporting such a claim. Indeed, the House Report to the FSIA demonstrates that Congress kept in place a court's normal discovery apparatus in FSIA proceedings. *See* H.R. Rep. No. 94-1487, at 23 (1976) ("The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area."). And the same report illustrates that Congress specifically contemplated that contempt sanctions would be available under the FSIA as a remedy for discovery violations:

[If] a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply. Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. *However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.* *Id.* (emphasis added); *see also* Fed. R. Civ. P. 37(b)(2)(A)(vii) (sanctions available for failure to abide by court-ordered discovery).

* * * *

To be sure, the Fifth Circuit in *Af-Cap Inc.*, upon which the government and the DRC heavily rely, held that a contempt order requiring the Republic of Congo to pay money into the court's registry and send its business associates notice of an outstanding judgment was inconsistent with the FSIA. The court concluded that "[sections 1610 and 1611 of the FSIA] describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included." *Af-Cap*, 462 F.3d at 428. Although the Seventh Circuit in *Autotech* distinguished *Af-Cap* on the grounds that the Fifth Circuit did not purport to decide the antecedent "power" question, i.e. whether the statute precluded the contempt order, *see Autotech Techs.*, 499 F.3d at 745, it does seem to us that the Fifth Circuit accepted the government's litigating effort to conflate the power to impose a contempt sanction with the authority to enforce it (as we noted, the government apparently filed a similarly confusing brief in that case). In any event, since the Fifth Circuit never considered the distinction between the two types of orders, we do not regard its decision as persuasive. We agree with the Seventh Circuit that contempt sanctions against a foreign sovereign are available under the FSIA.

* * * *

5. Service of process

Section 1608(a) of the FSIA provides four methods of service of process on a foreign state:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
- (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
- (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

FSIA § 1608(b) similarly provides a hierarchy for methods of service of process on an agency or instrumentality of a foreign state. This section discusses a selection of cases in 2011 in which the interpretation of FSIA § 1608 was at issue.

a. Avelar

See the discussion in section A.3.b(2) *supra*, for background on this case in which the United States filed a statement of interest. The section of the statement of interest arguing that service of process was improper in the case is excerpted below (with footnotes and citations to the record omitted). The statement of interest is available at www.state.gov/s/l/c8183.htm.

* * * *

A. Based on the Record, Plaintiff’s Purported Service of the Amended Complaint on the Congo’s U.N. Mission Failed to Comply with the FSIA and Was Contrary to the Vienna Convention.

A lawsuit against a foreign state’s permanent mission to the United Nations is, by definition, a suit against a foreign sovereign. *See Gray v. Perm. Mission of the People’s Republic of the*

Congo to the U.N., 443 F. Supp. 816, 819_20 (S.D.N.Y.) (“[I]t is hard to imagine a purer embodiment of a foreign state than that state’s permanent mission to the United Nations.”), *aff’d without opinion*, 580 F.2d 1044 (2d Cir. 1978); *Lewis & Kennedy, Inc. v. Perm. Mission of the Republic of Botswana to the U.N.*, No. 05 Civ. 2591, 2005 WL 1621342, at *3 (S.D.N.Y. July 12, 2005) (citing *Gray*, 443 F. Supp. at 820). Therefore, Plaintiff was required to serve process upon the Congo’s U.N. Mission in accordance with 28 U.S.C. § 1608(a), which governs service “upon a foreign state” in both the “courts of the United States and of the States.”

Plaintiff bears the burden of showing that he properly served the Mission in accordance with Section 1608(a). *Lewis & Kennedy*, 2005 WL 1621342, at *2. Plaintiffs must comply strictly with the service of process requirements of Section 1608(a). *See USAA Casualty Ins. Co. v. Perm. Mission of the Republic of Namibia*, No. 10 Civ. 4262, 2010 WL 4739945, at *1 (S.D.N.Y. Nov. 17, 2010); *Lewis & Kennedy*, 2005 WL 1621342, at *3 (“Courts have been unequivocal that § 1608(a) ‘mandates strict adherence to its terms, not merely substantial compliance.’” (citation omitted)). As a result, a plaintiff cannot excuse his failure to comply with Section 1608(a) by showing the defendant had actual notice of the lawsuit. *See Finamar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 118 (S.D.N.Y. 1995) (“Whether or not respondent received actual notice of the suit is irrelevant when strict compliance is required.”).

Subsections (1) through (4) of Section 1608(a) provide the only four methods by which process may be served on a foreign state. The record contains evidence of only one attempt to serve process on the Congo’s U.N. Mission: hand delivery on July 17, 2009, of the summons and amended complaint in English upon an unidentified woman on the premises of the Mission. This purported service, proof of which was used to obtain the default judgment, failed to comply with any of the methods set forth in subsections (1) through (4) of Section 1608(a):

- a. There is no evidence in the record that there has ever been any special arrangement between Plaintiff and the Congo’s U.N. Mission for service of process under Section 1608(a)(1).
- b. The Republic of the Congo is not a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at the Hague on Nov. 15, 1965, T.I.A.S. 6638 [hereinafter Hague Service Convention], the principal convention governing service of judicial documents under Section 1608(a)(2). *See* Hague Conference on Private International Law, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last updated Apr. 8, 2011). Plaintiff does not purport to have made service consistent with the Hague Service Convention or any other convention.
- c. Plaintiff does not purport to have made service under Section 1608(a)(3) by arranging for the clerk of court to send by mail copies of the summons, amended complaint, and a notice of suit, as well as translations of each into French (the official language of the Republic of the Congo), to the head of the Republic of the Congo’s ministry of foreign affairs. Certainly, Plaintiff’s July 17, 2009 attempt to serve process by hand on an unnamed woman on the Mission’s premises does not satisfy Section 1608(a)(3)’s requirements.
- d. Finally, Plaintiff does not purport to have served process under Section 1608(a)(4) by arranging for the clerk of court to send by mail to the Department of State’s Director of Special Consular Services, for transmission via diplomatic channels, two copies each of the summons, amended complaint, and a notice of suit, all

translated into French. Clearly, the one attempt to serve process on the Mission that is reflected in the record does not comply with Section 1608(a)(4).

Thus, Plaintiff's purported service of the summons and the amended complaint upon the Congo's U.N. Mission failed to comply with Section 1608(a) and was therefore ineffective to initiate an action against it.

In addition, Plaintiff's attempt to serve process upon the Congo's U.N. Mission was contrary to the inviolability of the Mission because, according to the record, Plaintiff had a process server personally deliver a copy of the amended complaint and summons on the premises of the Mission. Article 22 of the Vienna Convention, which, as noted previously, applies to permanent missions to the United Nations through the Headquarters Agreement and the U.N. Convention, states that "[t]he premises of the mission shall be inviolable." The term "inviolable" is an "advisedly categorical, strong word." 767 *Third Avenue Assocs.*, 988 F.2d at 298. The Vienna Convention "recognize[s] no exceptions to mission inviolability." *Id.* at 300 (holding that Article 22 prevents a landlord from evicting a diplomatic mission to the U.N. from its premises for non-payment of rent).

The principle of mission inviolability set forth in Article 22 precludes service of process on the premises of a mission. *See 40 D 6262 Realty Corp. v. United Arab Emirates*, 447 F. Supp. 710, 712 n.3 (S.D.N.Y. 1978) (citing Article 22 in holding ineffective purported service of process by posting copies of the summons and complaint on the premises of a foreign mission and mailing copies of those documents to the mission). The drafters' commentary on Article 22 confirms that service of process on the premises of a mission runs afoul of the principle of mission inviolability:

A special application of this principle is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. The service of such documents should be effected in some other way.

Report of the International Law Commission, Diplomatic Intercourse and Immunities, U.N. GAOR, 13th Sess., Supp. 9, U.N. Doc. A/3859 (1958), *reprinted in* [1958] II Y.B. Int'l L. Comm'n 89, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1. In its comments on a draft of Article 22, the United States also explicitly "agree[d] that a process server may not serve a summons or process on the premises of the mission." *Id.* at 136. Since the premises of the Congo's U.N. Mission are inviolable under the Vienna Convention, Plaintiff could not properly effectuate service by personally serving an unnamed woman on the premises of the Mission. *See 40 D 6262 Realty Corp.*, 447 F. Supp. at 712 n.3.

B. Based on the Record, Plaintiff Failed to Properly Serve the Default Judgment Upon the Congo's U.N. Mission in Accordance with the FSIA.

Another provision of the FSIA, 28 U.S.C. § 1608(e), specifies that a copy of any default judgment obtained against a foreign state "shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section," *i.e.*, using one of the four methods specified in Section 1608(a), which are discussed in Part A above. There is no indication in the record that Plaintiff served the default judgment upon the Congo's U.N. Mission in accordance with any of the methods specified in Section 1608(a). Thus, Plaintiff appears to have failed to properly serve the Congo's U.N. Mission with the default judgment.

* * * *

In its November 2011 order dismissing the case, the court agreed with the United States that service in the case was improper under the FSIA. That portion of the court's decision is excerpted below (with footnotes and citations to the record omitted).

* * * *

The service provision of the FSIA, § 1608(a), is the exclusive provision by which a plaintiff in a civil action may effect service of process on a “foreign state.” *See Daly*, 30 F.Supp.2d at 416; *see also* Fed. Civ. R. Proc. 4(j) (“A foreign state ... must be served in accordance with § 1608.”). Section 1608(a) (1)-(4), ... authorizes four methods of service... Courts unequivocally hold that § 1608(a) “mandate[s] strict adherence to its terms, not merely substantial compliance.” *Finamar Investors Inc. v. Republic of Taj.*, 889 F.Supp. 114, 117 (S.D.N.Y.1995); *see Gray*, 443 F.Supp. at 820; *see also Magness v. Russ. Fed’n*, 247 F.3d 609, 615 (5th Cir.2001); *BPA Int’l, Inc. v. Kingdom of Swed.*, 281 F.Supp.2d 73, 84 (D.D.C.2003); *cf. Finamar Investors*, 889 F.Supp. at 117 (mere “substantial compliance” may suffice for service on an “agency or instrumentality of a foreign state” pursuant to § 1608(b)). FSIA governs service of process in state and federal courts alike. *See* § 1608(a) (“Service in the courts of the United States and of the States shall be made upon a foreign state [as follows.]”); *see also, e.g., Trans Commodities, Inc. v. Kaz. Trading House*, No. 96–CV–9782 (BSJ), 1997 WL 811474, at *4 (S.D.N.Y. May 28, 1997) (“[T]he FSIA ... sets forth four possible methods of service to be used in a suit against a foreign state in any court—state or federal—in the United States.”) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491–97, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)).

B. Purported service on Congo Mission

Congo Mission is a “foreign state” for purposes of the FSIA. *Gray*, 443 F.Supp. at 820; *Lewis & Kennedy, Inc. v. Permanent Mission of Republic of Bots.*, No. 05–CV–2591, 2005 WL 1621342, at *3 (S.D.N.Y. July 12, 2005). Therefore, service on Congo Mission is governed by § 1608(a).

The various steps taken by plaintiff to apprise Congo Mission of the pendency of the instant litigation did not comply with the FSIA. Plaintiff delivered a copy of the state court summons and complaint to a receptionist working at Congo Mission premises, mailed various discovery and litigation-related documents to Congo Mission, and mailed a copy of the state court order awarding default judgment. Plaintiff does not claim these efforts were undertaken pursuant to any private agreement with Congo Mission. *See* § 1608(a)(1). The People’s Republic of the Congo is not a party to the most commonly cited international convention, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Convention”)—which in any event applies only to international service—and plaintiff does not contend his purported service complied with any international convention. *See* Hague Convention, art. 31, Nov. 15, 1965, 20 U.S.T. 361; § 1608(a)(2); *Lewis & Kennedy, Inc.*, 2005 WL 1621342, at *4; *Daly*, 30 F.Supp.2d at 416; 13A Federal Procedure, Lawyers Edition § 36:418 (2011). Plaintiff did not effect service by the Clerk of this Court or the state court, or by the United States Department of State. *See* § 1608(a)(3)-(4). Thus, plaintiff did not comply with the FSIA service provisions, and the Court is without power to deem plaintiff’s asserted compliance “in principle” sufficient to meet the strict standard of adherence the statute

demands. *See Finamar Investors*, 889 F.Supp. at 117. At most, Congo Mission had notice of the action, but “informal notification through channels clearly outside the obvious requirements of [the FSIA] cannot be substituted for those which meet the requirements.” *Gray*, 443 F.Supp. at 821 (noting also that delivery of process to “[Congo Mission’s] secretary” does not comply with the FSIA). The United States, in asserting its diplomatic interest in this case, both as host nation to the United Nations and a member of that body, agrees that service was improper.

Therefore, as plaintiff failed properly to serve Congo Mission, the state court’s default judgment is a nullity, as are all subsequent liens, attachments and restraints on Congo Mission property levied in execution of that judgment. 14C Wright *et al.*, *supra*, § 3738 (“The federal court ... may reconsider a default judgment entered by the state court prior to the removal, if the removal notice has been filed within the time period specified in the removal statute.”); *see Covington Indus., Inc. v. Resintex A. G.*, 629 F.2d 730, 732 (2d Cir.1980) (“A judgment entered against parties not subject to the personal jurisdiction of the rendering court is a nullity.... [T]he enforcing court has the inherent power to void the judgment, whether the judgment was issued by a tribunal within the enforcing court’s domain or by a court of a foreign jurisdiction.”) *Granville Gold Trust–Switz.*, 924 F.Supp. at 402–03 (noting that court’s prior vacatur pursuant to Rule 60(b) of state court default judgment for improper service under FSIA); *Gray*, 443 F.Supp. at 821; *see also First City, Tex.-Hous., N.A. v. Rafidain Bank*, No. 09–CV–7360(JSM), 1992 WL 296434, at *1 (S.D.N.Y. Oct.6, 1992) (“It is well settled that absent effective service [under the FSIA], a court lacks jurisdiction over the defendant and all actions pertaining to such defendants, including the [state court’s] entry of default judgment, are void.”).

* * * *

b. Chettri v. Nepal Bangladesh Bank

In May 2011, the United States filed a statement of interest in the U.S. District Court for the Southern District of New York in a case brought against the central bank of Nepal (“Nepal Rastra Bank”) and the Department of Revenue Investigation of the Government of Nepal (“DRI”). *Chettri v. Nepal Bangladesh Bank, et al.*, 10-8470 (S.D.N.Y.). The U.S. statement of interest explained that these two defendants were immune from suit because they had not been properly served under the FSIA. Excerpts of the U.S. statement of interest follow (with citations to the record omitted). The full text of the U.S. statement of interest is available at www.state.gov/s/l/c8183.htm.

* * * *

Section 1608 of the FSIA...sets out the requirements for service on a foreign state and its political subdivisions, agencies and instrumentalities. ...Because it appears that Plaintiffs failed to adhere to the provisions of Section 1608(a), DRI was not properly served in this matter. Likewise, because it appears that Plaintiffs failed to adhere to the provisions of Section 1608(b), Nepal Rastra Bank was also not properly served in this matter. Absent proper service, entry of a default judgment is improper.

* * * *

DRI is a department within Nepal's Ministry of Finance, and therefore a political subdivision of the Government of Nepal. ...

* * * *

Courts have uniformly held that service on a foreign state and its political subdivisions must strictly comply with the requirements of Section 1608(a). ...

In the instant case, the docket does not reflect any attempt to serve DRI in compliance with the procedures specified in Section 1608(a). ...

Rather, the docket indicates that service of the summons and complaint was attempted by personal delivery on Amrit Rai, an employee of the Office of General Consulate of Nepal in New York. ... This attempted method of service fails on several grounds. First, it does not comply with Section 1608(a). ... Second, this attempt at service through Mr. Rai is also impermissible under Article 43 of the Vienna Convention on Consular Relations, which provides that, "[c]onsular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." ... Third, it appears that Mr. Rai also serves as Counselor at the Nepal Mission to the United Nations in New York, which is located on the same premises as the Nepalese Consulate. The premises of a United Nations mission are inviolable. ... Mr. Rai enjoys personal inviolability and comprehensive civil immunity in his role as member of the Nepal mission to the United Nations and thus cannot be served or made an involuntary agent for service of process. ...

* * * *

...Plaintiffs argue that DRI "had actual notice of the lawsuit." Even if that were true, a party's notice of a lawsuit is irrelevant to a determination as to whether service is proper under Section 1608(a).

* * * *

The parties agree that Nepal Rastra Bank is an "agency or instrumentality" of Nepal, as defined in Section 1603(b) of the FSIA. ...

Like the service provisions of Section 1608(a), the requirements in Section 1608(b) fulfill the critically important goal of ensuring that foreign state agencies have meaningful notice of the initiation of a suit against them. Although "several federal courts have rejected a strict reading of section 1608(b) and have upheld service where the serving party has 'substantially complied' with the requirements under the Act," *Sakhrani v. Takhi*, No. 96-CV-2900 (KMW)(RLE), 1997 WL 33477654, at *6 (S.D.N.Y. Sept. 10, 1997)..., it is not necessary for the purposes of this case to determine whether substantial compliance would be sufficient. ...

In this case, Plaintiff failed to substantially comply with the provisions of Section 1608(b). The docket indicates that service of the summons and complaint upon Nepal Rastra Bank was attempted only by personal delivery on Mr. Rai. That method does not comply with any of the provisions of Section 1608(b), is impermissible under Article 43 of the Vienna Convention on Consular Relations, and is inconsistent with the inviolability of United Nations missions. ...

...[Plaintiffs'] later service also did not substantially comply with the provisions of 1608(b).

...[T]he docket sheet shows that Plaintiffs attempted to serve the order to show cause by personal service on Raj Kumar Shrestha at Nepal Rastra Bank. ...However, service by personal delivery to Mr. Shrestha at Nepal Rastra Bank may only comply with Section 1608(b) if: (a) Mr. Shrestha was "authorized...by appointment or by law to receive service of process," 28 U.S.C. § 1608(b)(2); and (b) the delivery was made in the United States—neither of which is alleged here.

...[T]here is no indication that the documents were translated into Nepalese, as required by Section 1608(b)(3). In addition, ...Plaintiffs did not effectuate service as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request. ...And finally, Plaintiffs failed to comply with Section 1608(b)(3)(C) because Plaintiffs failed to demonstrate that any of their attempts at service were "directed by order of the court consistent with the law of the place where service is to be made." 28 U.S. C. § 1608(b)(3)(C).

* * * *

B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity post-*Samantar*.

2. Samantar

a. U.S. statement of interest on remand to the district court

On February 14, 2011, the United States submitted a statement of interest in the U.S. District Court for the Eastern District of Virginia to convey the Department of State's determination that the defendant, a former Somali official, was not immune from suit. *Yousuf v. Samantar*, No. 04-1360 (E.D. Va.). The suit was brought, pursuant to the Torture Victim Protection Act ("TVPA") and the Alien Tort Statute ("ATS"), against Mohamed Ali Samantar, a U.S. resident who had formerly served in several high-ranking positions in the Somali government. In 2011, the case was before the district court on remand from the U.S. Supreme Court. See *Digest 2010* at 397-428 and *Digest 2009* at 370-74 for background on the case.

The U.S. statement of interest in *Yousuf v. Samantar* relied on the Supreme Court's determination in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), that the FSIA does not govern the immunity of individual officials. The statement of interest included as an exhibit the determination of the Department of State that Samantar does not enjoy immunity from the

jurisdiction of U.S. courts in this action. Excerpts of the U.S. statement of interest follow (with footnotes and citations to the record omitted). The full text, including the State Department's determination as Exhibit 1, is available at www.state.gov/s/l/c8183.htm.

* * * *

In *Samantar*, the Supreme Court explained that if the Department of State recognized and accepted the foreign government's request for a suggestion of immunity, the district court surrendered its jurisdiction. 130 S. Ct. at 2284. The Executive's role traditionally has encompassed acknowledging that certain foreign government officials enjoy immunity because of their particular status as well as acknowledging whether the officials should be immune from suit for the conduct at issue. *See, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department's determination that alleged conduct was of a public, as opposed to a private/commercial nature). Taking into account the relevant principles of customary international law, the Department of State has made the attached determination on immunity in this case, and we explain below certain critical factors underlying the Executive's determination here. Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that Defendant is not immune from suit. *See Samantar*, 130 S. Ct. at 2284; *Isbrandtsen Tankers*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit. *See* State Dep't Letter, attached as Ex. 1. Particularly significant among the circumstances of this case and critical to the present statement of interest are (1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.

The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. *See, e.g., Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits) (a foreign official "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"). Former officials generally enjoy residual immunity for acts taken in an official capacity while in office. *Id.* Because the immunity is ultimately the state's, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.").

The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. *See Samantar*, 130 S.Ct. at 2284... . Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law,

the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity.

This case presents a highly unusual situation because the Executive Branch does not currently recognize any government of Somalia. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."). ...

As noted, a former official's residual immunity is not a personal right. It is for the benefit of the official's state. In the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here. That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States. *See* Ex. 1. In future cases presenting different circumstances, the Department could determine either that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.

The Executive's conclusion that Defendant is not immune is further supported by the fact that Defendant has been a resident of the United States since June 1997. A foreign official's immunity is for the protection of the foreign state. Thus, a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office. Basic principles of sovereignty, nonetheless, provide that a state generally has a right to exercise jurisdiction over its residents. *See, e.g., Schooner Exchange*, 11 U.S. at 136. In the absence of a recognized government that could properly ask the Executive Branch to suggest the immunity of its former official, the Executive has determined in this case that the interest in permitting U.S. courts to adjudicate claims against U.S. residents warrants a denial of immunity.

* * * *

b. U.S. brief as amicus in the U.S. Court of Appeals for the Fourth Circuit

After the district court accepted the U.S. Department of State's determination of non-immunity and denied Samantar's motion to dismiss, Samantar appealed to the Court of Appeals for the Fourth Circuit. *Yousuf v. Samantar*, No. 11-1479 (4th Cir.). On October 24, 2011, the United States filed a brief as *amicus curiae* in the Fourth Circuit to reiterate its determination of non-immunity and support a decision affirming the district court's dismissal of the motion to dismiss. The U.S. *amicus* brief is excerpted below (with footnotes and citations to the record in the case omitted) and is available in full at www.state.gov/s/l/c8183.htm.

* * * *

After the Government informed the district court that the State Department had determined that Samantar is not immune from this suit, the district court properly denied Samantar's motion to dismiss.

1. In holding that the FSIA does not govern Samantar's claim of foreign official immunity, the Supreme Court described the courts' historic deference to Executive Branch foreign sovereign immunity determinations before Congress enacted the FSIA. *Samantar*, 130 S. Ct. at 2284. The Supreme Court explained that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar*, 130 S. Ct. at 2284. The Court first recognized the doctrine in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812). *Samantar*, 130 S. Ct. at 2284. "Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Ibid.* A foreign state facing suit in our courts could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid.* But if the State Department took no position in the suit, "a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (quotation marks omitted). In such a circumstance, the district court was to apply "the established policy of the [State Department]" to determine whether the foreign state was entitled to immunity. *Ibid.* (quotation marks omitted).

Of considerable significance to this case, the Supreme Court further explained that, "[a]lthough cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity." *Id.* at 2284–85 (citing cases). Accepting the Government's argument as *amicus curiae*, the *Samantar* Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 2291. Accordingly, the Court could discern "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Ibid.* And, as the Supreme Court explained, the State Department's role was to determine whether a foreign state or official was immune from suit and courts would look to principles articulated by the State Department when determining foreign official immunity in suits in which the State Department did not participate. *Id.* at 2284.

At the time this suit was before the Supreme Court, the State Department had made no determination concerning Samantar's immunity. Accordingly, the Court left open the question whether Samantar "may be entitled to immunity under the common law," and it remanded the suit "for further proceedings consistent with this opinion." *Id.* at 2292–93. On remand, the Government informed the district court that the State Department had determined that Samantar is not immune from this suit.... Under the Supreme Court's decision in this case, that determination was binding, and the district court properly gave it effect.

2.a. In attacking the district court's order, Samantar principally argues that the common law of foreign official immunity impels courts to defer only to Executive Branch determinations that a foreign official is immune from suit, but not to determinations that the official lacks immunity. But Samantar's argument is contrary to the Supreme Court's explanation of the State Department's role in foreign official immunity determinations.

First, Samantar focuses on the Supreme Court's statement, describing pre-FSIA practice, that "in the absence of recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (quoting *Samantar*, 130 S. Ct. at 2284 (emphasis omitted)). Samantar's reliance on this sentence is misplaced. As plaintiffs argue in their appellee brief, in context, it is clear that the Supreme Court did not suggest that courts had authority before the FSIA was enacted to disregard the

State Department's determination that a foreign sovereign was not immune from suit. Rather, the Supreme Court explained that, when the State Department made no immunity determination, the district court should make the determination, by considering “*whether the ground of immunity is one which it is the established policy of the[State Department] to recognize.*” *Samantar*, 130 S. Ct. at 2284 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)) (emphasis added). Thus, the Supreme Court recognized that the State Department's immunity principles govern the courts' determinations regarding foreign official immunity.

This rule is confirmed by the pre-FSIA immunity decisions cited by the Court in *Samantar*. In *Ex Parte Peru*, for example, the Supreme Court held that in suits against foreign governments, “the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In that case, involving an *in rem* action against a foreign state-owned vessel, the Supreme Court unambiguously stated “that courts are required to accept and follow the executive determination that the vessel is immune.” *Ibid.*

More importantly, the Supreme Court shortly thereafter noted that “[e]very judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government.” *Hoffman*, 324 U.S. at 35 (emphasis added). For that reason, the Court instructed that — in words that directly rebut *Samantar*'s argument — it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” *Ibid.* (emphasis added). The Supreme Court added that “recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.” *Id.* at 36.

In sum, the law that developed in various Supreme Court opinions — and that the Court in *Samantar* held had not been displaced by Congress when it enacted the FSIA — stated unequivocally that the courts should not either deny or recognize immunity for a foreign official contrary to determinations of the State Department. *Samantar*'s argument that a district court may disregard the State Department's determination that a specific former foreign official is not immune from suit is contrary to the Supreme Court's decision in this case. In a case like this one in which the Government has clearly stated the State Department's conclusion that *Samantar* is not entitled to foreign official immunity, and pointed to the particularly significant circumstances underlying the Government's Statement of Interest, a court would obviously not be following the “established policy of the State Department” (*Samantar*, 130 S. Ct. at 2284 (quotation and alternation marks omitted)), if it chose to overrule the State Department and grant immunity anyway.

In addition, *Samantar*'s contention that courts are free to override the State Department's determination that a foreign official is not immune from suit misunderstands the respective roles of the Executive Branch and the courts. Before the FSIA was enacted, the Supreme Court, this Court, and other courts of appeals recognized that judicial deference to Executive Branch determinations of foreign sovereign immunity was supported by the constitutional separation of powers. The Supreme Court grounded judicial deference to Executive Branch determinations of foreign sovereign immunity on the Executive's constitutional responsibility to conduct the Nation's foreign relations. See *Ex Parte Peru*, 318 U.S. at 588 (“That principle is that courts may

not so exercise their jurisdiction [over foreign sovereigns] as to embarrass the executive arm of the government in conducting foreign relations”); *accord Hoffman*, 324 U.S. at 35–36.

By referring to the Executive Branch’s constitutional authority over the conduct of foreign relations, this Court has similarly rejected the notion that courts may ignore the State Department’s immunity determinations. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (“Despite these contentions, we conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion”). Other Circuits have done likewise. ...

The Executive Branch’s constitutional authority over the conduct of foreign affairs continues as a foundation for the State Department’s authority to determine the immunity of foreign officials and for the courts’ duty to follow its determinations. *See Samantar*, 130 S. Ct. at 2291 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[T]raditional ways of conducting government * * * give meaning to the Constitution.” (quotation marks omitted)). In the absence of a governing statute, it is the State Department’s role to determine the principles governing foreign official immunity from suit.

b. *Samantar* appears to make a distinct argument that courts may properly defer to the State Department’s determination of a foreign official’s immunity only where the State Department has identified some foreign policy harm that would follow if the court fails to abide by the determination. That argument is mistaken; it confuses the rule of judicial deference to State Department immunity determinations with the Supreme Court’s explanation for the reasons underlying the rule.

As explained above, before the FSIA was enacted, the Supreme Court held that courts must give effect to the State Department’s determinations of foreign official immunity because, among other reasons, the failure to defer to the State Department’s decision could undermine the Executive Branch’s conduct of foreign relations. *See, e.g., Hoffman*, 324 U.S. at 35–36. But the Supreme Court never required the State Department to specifically articulate any foreign policy harm, let alone suggest, as does *Samantar*, that courts should review the State Department’s foreign policy judgments. As plaintiffs persuasively argue, such a requirement would conflict with the separation-of-powers principles underlying the requirement of judicial deference to determinations of foreign official immunity by the State Department.

Moreover, *Samantar*’s proposed requirement is foreclosed by Circuit precedent. *Rich*, 295 F.2d at 26 (“[T]he doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.”); *accord Hoffman*, 324 U.S. at 36; *Ex Parte Peru*, 318 U.S. at 588–89; *Southeastern Leasing Corp.*, 493 F.2d at 1224; *Isbrandtsen Tankers*, 446 F.2d at 1201; *see also Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir. 1988) (“Plaintiffs seek in this suit to investigate and evaluate the executive branch’s conduct of foreign policy, an area traditionally reserved to the political branches and removed from judicial review.”).

3. The United States largely agrees with plaintiffs’ arguments in support of the district court’s order denying *Samantar*’s motion to dismiss. However, plaintiffs’ brief makes misstatements of fact and law, some of which we briefly address.

a. Plaintiffs argue that Samantar is not entitled to head of state immunity because “[t]he United States never recognized Samantar as the head of state of Somalia,” and because the Somali Constitution designates the President, not the Prime Minister, as the head of state. Although Samantar is not entitled to head of state immunity from this suit, it is not for these reasons.

The State Department has determined that Samantar is not immune from this suit under any immunity doctrine. As explained above, that determination controls. *See also United States v. Noriega*, 117 F.3d 1206, 1211–12 (11th Cir. 1997) (declining to recognize defendant’s claim to head of state immunity where Executive Branch made clear that the defendant did not enjoy such immunity).

b. Regarding Samantar’s claim to foreign official immunity (as distinct from his claim to head of state immunity), plaintiffs correctly argue that foreign official immunity is not an individual right of the official, but instead is for the benefit of the foreign state. But plaintiffs further contend that the State of Somalia “does not exist in the eyes of the United States government.” And plaintiffs argue that, under the “governing legal standard”— which plaintiffs identify as Section 66(f) of the Restatement (Second) of the Foreign Relations Law of the United States— “the common-law basis for asserting [foreign official] immunity largely evaporates”. This argument and its factual premise are mistaken.

The United States does not currently recognize any entity as the *government* of Somalia. But the United States continues to recognize Somalia as an independent state of the world. *See* Bureau of Intelligence and Research, U.S. Dep’t of State, *Independent States of the World* (Oct. 11, 2011), <http://www.state.gov/s/inr/rls/4250.htm> (listing Somalia among independent states recognized by the United States). The fact that the United States does not currently recognize a government of Somalia is relevant to Samantar’s immunity, but not because of anything in the Second Restatement. Rather, the absence of a recognized Somali government is relevant to Samantar’s immunity because the Executive Branch identified it as a factor “critical” to the State Department’s immunity determination in this case. It is that determination that controls.

* * * *

3. *Ahmed v. Magan*

On March 15, 2011, the United States submitted a statement of interest in a case in the U.S. District Court for the Southern District of Ohio. *Ahmed v. Magan*, No. 10-342. The *Ahmed* case is similar to *Samantar*, discussed in section 2 above. The suit against Magan, another former Somali official, was brought by a different plaintiff, Ahmed, a native of Somalia, who alleged that Magan, as a colonel and chief of the National Security Service Department of Investigations in Somalia, had directed and participated in interrogating and torturing plaintiff and others. Magan resides in the United States and Ahmed is a resident and citizen of the United Kingdom. The suit was also brought pursuant to the TVPA and the ATS. The statement of interest in *Ahmed*, like the statement of interest in *Samantar*, conveyed the State Department’s determination of non-immunity. The full text of the U.S. statement of interest in *Ahmed* and the State Department’s determination of non-immunity are both available at www.state.gov/s/l/c8183.htm.

4. *Abi Jaoudi and Azar Trading Corp. v. CIGNA*

On December 5, 2011, the United States filed a statement of interest, including the State Department's determination on immunity as exhibit 1, in *The Abi Jaoudi and Azar Trading Corp. v. Cigna Worldwide Ins. Co.*, No. 91-6785 (E.D. Pa.). The Abi Jaoudi and Azar Trading Corp. ("AJA") had obtained a judgment against Cigna Worldwide Insurance Company ("Cigna" or "CWW") in Liberian courts for property damage resulting during the Liberian civil war. AJA sought to enforce the Liberian judgment, but U.S. courts had previously determined that CWW rightfully invoked the insurance policy's war risk provision and had issued an anti-suit injunction against further proceedings to collect on the insurance claims.

In 2008, CWW brought contempt proceedings against AJA and other respondents based on their efforts to pursue enforcement of the Liberian judgment. Respondent Josie Senesie served as Liberian Insurance Commissioner and was appointed in 2007 by the Liberian government as receiver of the estate of CWW's Liberian branch. Respondent Senesie retired while the contempt proceedings were pending and was replaced by respondent Foday Sesay.

Excerpts from the statement of interest follow. Both the statement of interest and exhibit 1, the State Department's immunity determination, are available at www.state.gov/s/l/c8183.htm.

* * * *

In assessing immunity, the Department of State takes into account the relevant principles of international law, as well as the United States's foreign policy interests. In particular, current and former officials of a foreign state generally enjoy immunity for acts undertaken in their official capacities. See, e.g., *Arrest Warrant of 11 Apr. 2000* (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits). The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. See *id.* As a result, the Department of State takes into account the views of a foreign state as to the immunity of its own officials, including whether a foreign state understands its officials to have acted in an official capacity, when determining a foreign official's entitlement to immunity. However, the views of the foreign state on whether an act was taken in an official capacity are not dispositive. Another consideration relevant to the immunity determination is whether the law of the foreign state treats the act at issue as one taken in an official capacity.

In light of these principles and the particular facts of this case, the Department of State has concluded that Respondents Senesie and Sesay are immune from this contempt action to the extent the Court finds that the acts for which CIGNA seeks to hold them in contempt—namely, recognizing AJA's proof of claim based upon its Liberian judgment and initiating and continuing the indemnity suit in the Cayman Islands against ACE—were, under Liberian law, acts taken by Senesie and Sesay in their official capacities as Insurance Commissioners for the Republic of Liberia. See Letter from Harold Hongju Koh to the Honorable Tony West at 3, dated December 5, 2011 (attached as Ex. 1). Conversely, to the extent the Court finds that either or both of these acts were, under Liberian law, taken by Senesie and Sesay solely in their capacities as representatives of the estate and thus outside of their official capacities, the Department of State

concludes that they are not immune from this contempt action with respect to such acts. *Id.* The Department of State recognizes that Liberian law may treat acts taken in the Insurance Commissioner's capacity as representative of the estate as acts taken in his official capacity, in which event he would not be acting solely in his capacity as representative of the estate. *Id.*

Although, based on the current record, the United States is declining to take a position on whether, under Liberian law, the acts at issue were taken within Senesie's and Sesay's official capacities, leaving that determination to the Court, the United States does note there is at least some evidence in the current record bearing on this question.

* * * *

5. *Giraldo v. Drummond*: Immunity from providing testimony

On March 31, 2001, the United States filed a statement of interest and suggestion of immunity in the U.S. District Court for the District of Columbia in *Giraldo v. Drummond*, No. 1:10mc00764. Plaintiffs in the case sought to depose the former president of Colombia, Alvaro Uribe. The government of Colombia formally requested that the State Department take the steps necessary to have the subpoena for Uribe's testimony quashed on the basis of his immunity as a former head of state. The United States conveyed the State Department's determination that Uribe enjoys residual immunity from the court's jurisdiction insofar as plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official. The United States also requested that, in the interests of comity, the court require the plaintiffs to exhaust other means for obtaining any information not coming within the State Department's immunity determination before compelling the deposition of former president Uribe. On September 8, 2011, the district court issued its decision denying plaintiffs' motion to compel the testimony, holding that the former president had residual immunity and that plaintiffs had failed to exhaust other means of obtaining the information. 808 F. Supp. 2d 247 (D.D.C. 2011). Plaintiffs have appealed the court's decision.

The U.S. statement of interest is excerpted below and available in full at www.state.gov/s/l/c8183.htm. Exhibit 2 to the U.S. statement of interest, the Legal Adviser's letter conveying the Department of State's determination of immunity, is also available at www.state.gov/s/l/c8183.htm.

* * * *

As set forth more fully herein, the United States suggests that former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official. Insofar as Plaintiffs seek to depose former President Uribe regarding (i) acts performed or information that he obtained while not serving as a government official; or (ii) acts performed or information obtained during his time in office other than in his official capacity as a governmental official, the United States does not suggest that he is entitled to immunity. Nonetheless, in light of the concerns expressed by the Government of Colombia,

and in the interest of comity, the United States respectfully requests that this Court order Plaintiffs to exhaust other reasonably available means of obtaining the information they would seek from former President Uribe before ordering him to give a third-party deposition regarding those matters as to which he would not be entitled to testimonial immunity.

In support of its interest and suggestion, the United States sets forth as follows:

1. The United States has an interest in this action because it raises the question whether a former foreign governmental official, who has served in several governmental capacities including, among other offices, as a senator, governor of Antioquia Department, and President of Colombia, is immune from the Court's jurisdiction to compel his testimony. Historically, in suits against a foreign state or its officials, courts would look to the State Department for a determination of whether the foreign state or its official was immune from the courts jurisdiction or, instead, subject to it. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). The practice of judicial deference to State Department foreign sovereign immunity determinations has its roots in the Supreme Court's *Schooner Exchange* decision in 1812. *Id.*; see *the Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

2. Until the enactment of the Foreign Sovereign Immunities Act in 1976 (FSIA), 28 U.S.C. § 1602 et seq., courts routinely "surrendered" jurisdiction over suits against foreign sovereigns "on recognition, allowance, and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certification to that effect is presented to the court by the Attorney General." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); see *Samantar*, 130 S. Ct. at 2284; *Ex parte Peru*, 318 U.S. 578, 587-89 (1943). The Supreme Court made clear that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; see also *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

3. When Congress enacted the FSIA, it transferred from the Executive Branch to the courts the responsibility to make immunity determinations in suits against foreign states. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). Congress, however, did not codify standards for determining the immunity of foreign officials. Accordingly, many courts continued to look to the Executive Branch for a determination of foreign official immunity, especially in suits against foreign heads of state. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). Some courts nevertheless held that the FSIA and not the Executive Branch determined the principles governing foreign official immunity. See, e.g., *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990). The Supreme Court resolved the circuit conflict last Term, holding that, "[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Samantar*, 130 S. Ct. at 2291. In so

concluding, the Court found “no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.” *Id.* Thus, the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President’s responsibility for the conduct of foreign relations and recognition of foreign governments. Accordingly, courts today must continue to defer to Executive determinations of foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.

4. In making a foreign official immunity determination, the Department of State takes into account principles of international law as well as the United States’ foreign policy interests. Under international law, sitting heads of state enjoy a broad immunity from the jurisdiction of foreign courts. Considering customary international law, the Executive Branch historically has suggested the immunity from suit of sitting heads of state. See, e.g., *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004). Under international law, former heads of state have residual immunity from suit only for acts taken in an official capacity while in office. See, e.g., *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits). As with immunity for sitting heads of state, the Executive Branch historically has accepted this principle of residual immunity and has suggested the immunity from suit of former heads of state. See *A, B, C, D, E, F v. Jiang Zemin*, 282 F. Supp. 2d 875, 883 (N.D. Ill. 2003) (holding that head of state was immune from suit brought while he was sitting head of state even though he left office during the pendency of the litigation).

5. The Legal Adviser of the United States Department of State has informed the Department of Justice that the Colombian Government, through its Ambassador to the United States, Gabriel Silva, has formally requested that the Government of the United States suggest “any and all immunities applicable to President Uribe and to specifically request head-of-state immunity on his behalf.” Letter from Gabriel Silva to the Honorable Hillary Clinton, dated November 12, 2010 (attached as Exhibit 1). Taking into account the relevant principles of customary international law and the United States’ foreign policy interests, the Executive Branch has determined that permitting the action to proceed against former President Uribe would be incompatible with the principles adopted by the Executive Branch governing residual immunity insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official. Insofar as Plaintiffs seek to depose former President Uribe regarding (i) acts performed or information that he obtained while not serving as a government official; or (ii) acts performed or information obtained during his time in office other than in his official capacity as a governmental official, the United States does not suggest that he is entitled to immunity.

6. Insofar as Plaintiffs seek information from former President Uribe for which he does not enjoy immunity, the United States nonetheless retains a foreign relations interest in minimizing the burden on former President Uribe as a former head of state. On the present record, it does not appear that Plaintiffs can demonstrate that they have exhausted other reasonably available avenues to obtain the information about which they seek to depose former President Uribe. In this regard, Plaintiffs have advised the Department of State that they have not sought information from the Government of Colombia through letters rogatory or other avenues that may be available under Colombian law. See Letter from Harold Hongju Koh to the Honorable Tony West, dated March 31, 2011 (attached as Exhibit 2, with attachments). In view of comity concerns, the respect due former presidents of friendly states, and the concerns

expressed by the Colombian Government, the United States respectfully requests that, before allowing the deposition to proceed as to information or topics not subject to the Executive Branch's suggestion of immunity, this Court order Plaintiffs to exhaust other reasonably available methods of procuring such information.

7. The D.C. Circuit has recognized that principles of comity require courts to consider sensitivities that would be raised by an attempt to take the deposition of a senior foreign official, as such concerns would be raised when seeking the deposition of a senior U.S. official. *In Re Minister Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998). Cf. H.R. Rep. No. 94-1487 at 12, 23 (legislative history of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330; 1602-1611). Courts, moreover, should be wary of permitting deposition testimony from a former foreign official in the absence of a strong showing of a demonstrated need for testimony concerning material facts in the unique personal knowledge of that individual. Cf. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 546 (1987) (enjoining U.S. courts to “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position” and to “demonstrate due respect . . . for any sovereign interest expressed by a foreign state.”). Indeed, courts in this jurisdiction have appropriately required parties seeking to depose former high level officials to demonstrate that the former official’s “testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested.” *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990). In considering the impact of Plaintiffs’ efforts to seek the deposition of former President Uribe, moreover, the Court should take into consideration the interests of the United States. Discovery in U.S. courts involving the head of state of a friendly foreign state, or the former head of state, is rare and implicates the foreign policy interests of the United States. Because such cases are also rare in other countries, U.S. practice may influence how foreign courts handle this issue as well. In particular, foreign courts confronted with a request to compel discovery from former U.S. Presidents could apply reciprocally the standards used by U.S. courts.

* * * *

C. HEAD OF STATE IMMUNITY

On August 29, 2011, the United States submitted a suggestion of immunity of the sitting head of state of Rwanda, Paul Kagame, in the U.S. District Court for the Western District of Oklahoma. *Habyarimana et al. v. Kagame et al.*, No. 10-437-W (W.D. Okla.). The submission included as an exhibit an August 25, 2011 letter from State Department Legal Adviser Harold Hongju Koh to the Department of Justice requesting that the action be dismissed based on President Kagame’s immunity as the sitting head of state while in office. That letter is available at www.state.gov/s/l/c8183.htm. The U.S. suggestion of immunity, excerpted below, is available at www.state.gov/s/l/c8183.htm.

* * * *

1. The United States has an interest in this action because the sole remaining Defendant, President Kagame, is the sitting head of state of a foreign state, thus raising the question of President Kagame's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Kagame's immunity from this suit while in office.³

2. The Legal Adviser of the U.S. Department of State has informed the Department of Justice that Rwanda has formally requested the Government of the United States to suggest the immunity of President Kagame from this lawsuit. The Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Kagame as a sitting head of state from the jurisdiction of the United States District Court in this suit." Letter from Harold Hongju Koh to Tony West (copy attached as Exhibit A). As discussed below, this determination is controlling and is not subject to judicial review. No court has ever subjected a sitting head of state to suit once the Executive Branch has suggested the head of state's immunity.

* * * *

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity decisions are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by suggestions of immunity submitted by the Executive Branch. *See [Republic of Mexico v.] Hoffmann*, 324 U.S. [30] at 35–36 [(1945)]; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The courts' deference to Executive Branch suggestions of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

* * * *

7. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. Thus, acts committed before a sitting head of state assumed that position are not excluded from the scope of his immunity while in office. *See, e.g., Doe [v. Roman Catholic Diocese of*

³ The fact that the Executive Branch has the constitutional power to suggest the immunity of a sitting head of state does not mean that it will do so in every case. The Executive Branch's decision in each case is guided, inter alia, by consideration of international norms and the implications of the litigation for the Nation's foreign relations.

Galveston-Houston], 408 F. Supp. 2d [272] at 281 [(S.D. Tex. 2005)] (accepting the Executive Branch determination that the incumbent Pope enjoyed head of state immunity for acts allegedly committed before he became the Pope). After a head of state leaves office, however, that individual generally retains residual immunity only for acts taken in an official capacity while in that position and not for alleged acts predating the individual's tenure in office. *See* 1 *Oppenheim's International Law* 1043–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). In this case, because the Executive Branch has determined that President Kagame, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Kagame is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

D. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

On February 24, 2011, the United States filed a statement of interest in the U.S. District Court for the Central District of California in *Hassen v. Sheikh Mohamed et al.*, No. 09-1106 (C.D. Cal.). The United States notified the court in its statement of interest that the defendant, His Highness Sheikh Mohamed Bin Zayed Al Nahyan ("Sheikh Mohamed"), had not been lawfully served in the case because the plaintiff had attempted to serve Sheikh Mohamed through diplomatic agents who are inviolable and immune from service of process pursuant to the Vienna Convention on Diplomatic Relations ("Vienna Convention"). The U.S. statement of interest provided as exhibit 1 a letter from Mr. Koh.

The statement of interest and the attached State Department determination explained that the Vienna Convention disallows treating diplomats as involuntary agents for the purpose of service of process. The U.S. statement of interest, including the State Department's letter as exhibit 1, is available at www.state.gov/s/l/c8183.htm.

On March 28, 2011, the United States filed a supplemental statement of interest with the court to respond to arguments by plaintiff that the court should apply the commercial activity exception in Article 31 of the Vienna Convention to validate the service of process on the diplomats. The United States explained in its supplemental brief that plaintiff's argument missed the mark because:

finding an exception to a diplomatic agent's immunity from jurisdiction requires a finding that the one otherwise entitled to immunity from jurisdiction was engaged in commercial activity. Art. 31(1)(c). Thus, in this case, finding an exception would require that the diplomatic agents themselves engaged in commercial activity, not the Defendants. Plaintiff does not allege that the UAE Ambassador and Military Attaché personally engaged in commercial activities.

The supplemental statement of interest is available at www.state.gov/s/l/c8183.htm.

E. INTERNATIONAL ORGANIZATIONS

1. Immunity of the United Nations

On July 6, 2011, the United States filed a statement of interest in U.S. District Court for the Southern District of New York in *Sadikoglu v. United Nations Development Program*, No. 11-0294 (S.D.N.Y.). The United States made its submission in response to the court's March 18, 2011 letter to the U.S. Attorney's Office inviting the United States to express its views on the exercise of jurisdiction over the United Nations Development Program ("UNDP").

Plaintiff brought the action against UNDP claiming breach of contract. The statement of interest explained that UNDP, as a part of the UN, enjoys absolute immunity from suit and legal process, absent an express waiver. The statement of interest is excerpted below (with footnotes and citations to the record omitted) and available at

www.state.gov/s/l/c8183.htm.

* * * *

A. The UN Enjoys Absolute Immunity

The UN General Convention, to which the United States is a party, explicitly provides that the UN is absolutely immune from suit in the absence of an express waiver—indeed, “from every form of legal process.” General Convention, art. II, § 2.

The United States understands this provision to mean what it unambiguously says: the UN, including, here, its integral component the UNDP, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. There is no allegation, much less evidence, that the UN has waived its immunity here. On the contrary, the UN itself expressly maintains its immunity, including the UNDP's, from this suit. *See* letters dated January 18 and April 14, 2011, from Stephen Mathias, Assistant Secretary-General in charge of UN Office of Legal Affairs, to Russell Graham, U.S. Mission to the UN, annexed (without enclosures) hereto respectively as Exhibits 1 and 2.

To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the United States Executive Branch's interpretation. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference under, *inter alia*, *Kolovrat*. The Executive Branch's interpretation should be given still greater deference in this case since, as noted above, the interpretation is shared by the UN. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to treaty agree on meaning of treaty provision, and interpretation “follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation”).

Consistent with the applicable treaty language and the Executive Branch's views, courts repeatedly, and indeed to the United States' knowledge uniformly, have recognized that “[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's

express waiver thereof in particular cases.” *Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y. 1987); *see also, e.g., Askir*, 933 F. Supp. at 371. ...

The UNDP, as an integral program of the UN, enjoys this same absolute immunity. Indeed, the Office of Legal Affairs of the United Nations equated the UNDP with the United Nations when requesting that the United States take action to assert the UN’s immunity in this case. ...

B. Plaintiff’s Arguments to Limit or Disregard the UN’s Immunities Under the General Convention Lack Merit

There is no merit to Plaintiff’s contention that the UN enjoys only functional, not absolute, immunity, and that the UN’s assertedly functional immunity does not extend to the alleged private contract in this case, which Plaintiff alleges constitutes commercial activity. According to Plaintiff, ... the UN Charter provides only for functional immunity because it states that the UN shall enjoy “such privileges and immunities as are necessary for the fulfillment of its purpose.” He further argues that commercial activities are not “necessary for the fulfillment of [the UN’s] purpose,” and therefore are not covered by the immunity granted by the UN Charter. Plaintiff is incorrect. While the UN Charter does not explicitly state what exact nature and extent of immunity is “necessary for the fulfillment of” the UN’s purposes, the General Convention eliminates any possible ambiguity by providing that “[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” General Convention, art. II, § 2. It is easy to understand why the UN would need such broad immunity; without it, it could be subject to over 190 disparate legal systems. ...

Plaintiff’s argument also is inconsistent with the plain meaning of Article II, Section 2 of the General Convention. While he is correct that the General Convention requires the UN to establish arbitration procedures to settle contract disputes, ... these provisions do not even remotely suggest that the UN has somehow waived its immunity from “legal process.” Indeed, these provisions actually complement the UN’s absolute immunity, and do not justify ignoring or limiting it as Plaintiff suggests. The UN’s provisions for non-judicial dispute resolution provide an alternative to judicial proceedings that mitigates any effects of the UN’s immunity from suit or process in member states’ court systems. However, nothing in the procedures Plaintiff invokes purports to limit or waive the UN’s immunity from judicial proceedings.

Also incorrect is Plaintiff’s contention that, if the General Convention were read to provide for absolute immunity, it would conflict with the UN Charter and to that extent would be inoperative pursuant to Article 103 of the UN Charter. Plaintiff has not established, and cannot establish, the conflict with the UN Charter on which his argument depends. The General Convention’s plain language providing for absolute immunity does not conflict with the UN Charter because, at the time the General Convention was adopted, the then-recently-adopted UN Charter had left that possibility open by not specifying the extent of immunity enjoyed by the UN. Indeed, the UN Charter itself anticipated the possible subsequent issuance of a convention setting forth a more specific definition of the scope of the UN’s immunity: Article 105, § 3 of the UN Charter specifically provides that “[t]he General Assembly may make recommendations with a view to determining the details” of the immunity provided to the UN in Article 105(1), “or may propose conventions to the Members of the United Nations for this purpose.” UN Charter, art. 105, § 3. The General Convention served this purpose...

C. The IOIA Did Not and Cannot Create an Exemption to the UN's Absolute Immunity Granted Under the UN Charter and General Convention

Plaintiff is incorrect to contend that the International Organizations Immunity Act ("IOIA"), 22 U.S.C. § 288 *et seq.*, limits the immunities afforded the UN in the General Convention to those enjoyed by foreign governments under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.* It is an open question in the Second Circuit whether, in any circumstances, the IOIA incorporates FSIA's exception to sovereign immunity for international organizations' commercial activities or whether it incorporates the absolute immunity that foreign governments enjoyed at the time of the IOIA's enactment. *See Brzak* [*v. United Nations*], 597 F.3d [107, 112 (2d Cir. 2010)].

This question does not matter here, however, because the UN Charter and General Convention make the UN absolutely immune, and the Second Circuit in a controlling decision has held that those provisions preclude a challenge to the UN's immunity based on the IOIA. *See id.* As the Second Circuit recognized: "[W]hatever immunities are possessed by other international organizations [subject to the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception." *Id.* Thus, Plaintiff's invocation of the IOIA here is unavailing.

D. The Court Cannot Exercise Jurisdiction Over the UN If Absolute Immunity Applies, Regardless of Whether Other Fora Are Available

Finally, even assuming *arguendo* that Plaintiff is correct that recognizing the UN's absolute immunity would leave Plaintiff with no forum to resolve his claim, the UN's immunity still precludes the Court from exercising jurisdiction over the UN, contrary to Plaintiff's argument. The UN's immunity under Section 2 of the General Convention is not contingent upon the UN's making provision for an appropriate mode of settlement pursuant to Section 29. ... Plaintiff has identified no United States case law in support of his position, thus leaving undisturbed the uniform body of this country's law enforcing the UN's absolute immunity.

Indeed, the Second Circuit in *Brzak* rejected a contention similar to Plaintiff's here: "Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. This observation applies with equal force here. Indeed, there is no basis to conclude that invoking the international law principle of *pacta sunt servanda* could ever enable a party to overcome the UN's treaty-based immunities, which themselves are entitled to be followed under the very same international law principle, merely based on allegations that the UN has breached a contract or violated a policy of submitting disputes to arbitration. Such an exception would swallow the applicable immunities and risk repeatedly embroiling the UN in litigation, thereby defeating the precise intent of the relevant treaty provisions. Accordingly, Plaintiff has provided no basis to disregard the UN's absolute immunity.

* * * *

2. Extension of Immunities

On March 8, 2011, President Obama issued Executive Order 13568, reprinted below, extending immunities to the Office of the High Representative in Bosnia and Herzegovina and to the International Civilian Office in Kosovo. 76 Fed. Reg. 13497 (Mar. 11, 2011).

* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. § 288) and the Extending Immunities to the Office of the High Representative in Bosnia and Herzegovina and the International Civilian Office in Kosovo Act of 2010 (Public Law 111-177), ***** I hereby extend to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) and to the International Civilian Office in Kosovo (and to its officers and employees), all the privileges, exemptions, and immunities provided by the International Organizations Immunities Act. In the event either of these organizations is dissolved, the privileges, exemptions, and immunities of that organization under the International Organizations and Immunities Act, as well as those of its officers and employees, shall continue to subsist.

This designation is not intended to abridge in any respect privileges, exemptions, or immunities that the Office of the High Representative in Bosnia and Herzegovina or the International Civilian Office in Kosovo, or the officers and employees thereof, otherwise may have acquired or may acquire by law.

* * * *

Cross References

Litigation under the Alien Tort Claims Act and the Torture Victim Protection Act, **Chapter 5.B.**
Act of state, **Chapter 5.C.**

Nazi era claims [Cassirer], **Chapter 8.B.2.**

Protecting power, **Chapter 9.A.**

Immunity of Vessels, **Chapter 12.A.7.**

International Civil Litigation, **Chapter 15.B.**

Revisions to the Cuban Asset Control Regulations, **Chapter 16.A.6.e(1)**

***** Editor's note: For discussion of the Extending Immunities to the Office of the High Representative in Bosnia and Herzegovina and the International Civilian Office in Kosovo Act of 2010 (Public Law 111-177), see *Digest 2010* at 459-60.

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies and Air Transport Agreements

Information on recent U.S. Open Skies and other air transport agreements, by country, is available at www.state.gov/e/eb/rls/othr/ata/index.htm. During 2011, activities on Open Skies included the following:

- On March 19, the United States and Brazil signed a new air transport agreement which, upon entry into force, will establish a bilateral Open Skies air transportation relationship between the two countries (agreement available at www.state.gov/e/eb/rls/othr/ata/b/br/159222.htm);
- On April 18, the United States and the Kingdom of Saudi Arabia initialed the U.S.-Saudi Arabia Open Skies Agreement, which will be applied on the basis of comity and reciprocity pending its entry into force (memorandum of consultations available at www.state.gov/e/eb/rls/othr/ata/s/sa/161210.htm);
- On May 10, the United States and Colombia signed a new air transport agreement which, upon entry into force, will establish a bilateral Open Skies air transportation relationship between the two countries (agreement available at www.state.gov/e/eb/rls/othr/ata/c/co/151202.htm);
- On June 21, the United States, of the first part, the 27 EU Member States and the European Union, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part, signed an agreement to apply the Air Transport Agreement signed by the United States and the European Community and its Member States on April 25 and 30, 2007, as amended, to Iceland and Norway; this agreement will enter into force upon an exchange of diplomatic notes among the Parties confirming that all necessary procedures for entry into force of the agreement have been completed; the agreement is available at www.state.gov/e/eb/rls/othr/ata/i/ic/170684.htm;
- On July 11, the United States and the Republic of Macedonia initialed the U.S.-Macedonia Open Skies air transport agreement, which will be applied on the basis of comity and reciprocity pending its entry into force (memorandum of consultations and agreement available at www.state.gov/e/eb/rls/othr/ata/m/mk/168779.htm);
- On December 13, the United States and St. Christopher and Nevis signed the U.S.-St. Christopher and Nevis Open Skies air transport agreement, which entered into force upon signature and is available at www.state.gov/e/eb/rls/othr/ata/s/sc/182341.htm.

Also in 2011, the United States marked a milestone of having negotiated Open Skies agreements with over 100 partners. Secretary of State Hillary Rodham Clinton's remarks on the occasion are excerpted below and are available in full at

www.state.gov/secretary/rm/2011/03/159389.htm.

* * * *

...[I]t's a real pleasure for me to welcome you ... as we celebrate the negotiation of agreements between the United States and 100 Open Skies partners. ...

...I want to extend a special greeting to Colombian Ambassador Gabriel Silva, whose country became our 100th partner last November. So thank you so much.

...[W]e know what the benefits are of these Open Skies agreements. They not only allow us to cross great distances, which I have been doing a lot of recently, but also to open up markets, create jobs, allow people in far-removed countries to interact, share information, and build businesses together.

For too long, however, restrictive agreements between governments cut off all of these potential connections. They kept airlines from entering certain markets. They forced shipping companies to fly inefficient routes with half-empty airplanes. And, by stifling competition, they kept air fares artificially high.

That's why the Department of State and Department of Transportation negotiated the first Open Skies Agreement, with the Netherlands, in 1992. Now, today, we have agreements with countries in every region of the world, from major economies, such as Japan, Canada and the European Union, to smaller but equally important countries such as El Salvador and Senegal. And on the President's recent trip to Latin America, we concluded our new agreement with Brazil, our 101st partner. And we look forward to expanding these partnerships around the world.

In each case, an Open Skies agreement has powerful benefits—fewer government restrictions, more competition, more jobs in the air and on the ground; more people trading, exchanging and interacting; cheaper flights, more tourists, new routes to new cities—so that we now have passengers and shippers enjoying direct services between cities like Las Vegas and Seoul, or Phoenix and Montreal.

Just consider for a minute what this agreement with one country, Colombia, will mean. Now, one of Colombia's biggest exports—fresh-cut flowers—will make it to the flower stands of the United States even faster because shippers will now have more direct access to more American cities. And on the U.S. side, our computers, sensitive electronics, and spare parts for all types of equipment will make it to Colombia more quickly and efficiently. And with more direct services between more points, we'll see more recreational and business travel between our two countries.

* * * *

2. European Union's Emissions Trading Scheme

In 2011, the United States joined multilateral efforts to prevent the European Union ("EU") from including in the EU Emissions Trading Scheme ("ETS") all international air carriers flying into or out of Europe. On September 30, 2011, more than 20 countries, including the U.S., issued a joint declaration opposing the inclusion of international aviation in the EU ETS and urging the EU to work on a global solution at the International Civil Aviation Organization ("ICAO"). The September 30 joint declaration, known as the Delhi Declaration, was later adopted by the 36 member ICAO Council, over the objection of eight EU Member States, on November 2, 2011 at the Second Meeting of the 194th Session of the ICAO Council. ICAO Doc. C-DEC 194/2. The November 2 Declaration adopted by the ICAO Council is set forth below and is available at www.ainalerts.com/ainalerts/alertimages/ICAO.pdf.

* * * *

Recognizing the essential role aviation plays in economic progress and market access for the world economy and its citizens;

Recognizing the importance of sustainable development;

Recalling the relevant provisions of the *United Nations Framework Convention on Climate Change (UNFCCC)*;

Stressing the importance of the Kyoto Protocol to its Parties;

Recalling [the] importance of the Chicago Convention and need for ensuring full compliance with its provisions;

Affirming the importance of the role [of] the International Civil Aviation Organization (ICAO) in addressing aviation emissions, including pursuant to the request from the Parties to the UNFCCC;

Recognizing that international aviation's growth makes it necessary to address the long-term growth of Greenhouse Gas (GHG) emissions that contribute to global climate change;

Noting that the overall increase in civil aircraft fuel efficiency of approximately 70 percent over the last 40 years has significantly reduced aviation greenhouse gas emissions;

Stressing that complementary national, regional, and global endeavours developed on the basis of collaboration and mutual agreement will enhance our capacity to address aviation emissions effectively;

Determining that emphasis should be placed on measures that will reduce aviation emissions while at the same time avoiding adverse impacts on air transport;

Desiring to provide strong leadership and to build upon the significant steps and the positive foundation established by the international community through ICAO's efforts;

The Council:

1. *Calls on ICAO* to continue to undertake efforts to reduce aviation's contribution to climate change;

2. *Intends to collaborate* in support of operational changes and improvements to air traffic management and airport systems, which will tend to reduce emissions of the aviation sector;

3. *Intends to accelerate* the development and implementation of low-carbon aircraft technologies and sustainable alternative fuels, and sharing of best practice;

4. *Supports ICAO efforts* to develop a meaningful aircraft CO₂ standard aiming for 2013;
5. *Opposes* the EU's plan to include all flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system (EU Directive 2008/101/EC), which is inconsistent with applicable international law;
6. *Urges* the EU and its Member States to refrain from including flights by non-EU carriers to/ from an airport in the territory of an EU Member State in its emissions trading system;
7. *Urges* the EU and its Member States to work collaboratively with the rest of the international community to address aviation emissions;
8. *Intends to continue* to work together to oppose the imposition of the EU ETS.

* * * *

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. Investment Dispute Settlement under Chapter 11

a. Final Award: Grand River Enterprises Six Nations, Ltd. v. United States of America

On January 12, 2011, a NAFTA Chapter 11 tribunal rejected all remaining claims against the United States brought by Grand River Enterprises Six Nations, Ltd., a Canadian corporation, and Jerry Montour, Kenneth Hill and Arthur Montour Jr., members of Canadian First Nations. *Grand River Enterprises Six Nations, Ltd. v. United States of America*. Claimants submitted their claims in 2004, challenging certain legislative measures taken by various states related to the landmark 1998 Master Settlement Agreement ("MSA") between multiple states and major U.S. tobacco companies. In 2006, the tribunal determined that some of the claims brought against the United States were time-barred. See *Digest 2006* at 688-93. See *Digest 2008* at 528-42 for a discussion and excerpts of the United States counter-memorial filed in the case. Claimants had sought as much as \$664 million in damages. A media note issued by the State Department summarized the tribunal's conclusions in its final award on the merits:

The Tribunal held that it did not have jurisdiction over the claims of Grand River Enterprises Six Nations, Ltd., Jerry Montour and Kenneth Hill because these Claimants did not have an investment in the United States. With regard to the claims of Arthur Montour Jr., the Tribunal held that the legislative measures in question were not discriminatory, did not violate the minimum standard of treatment provision of the NAFTA, and did not constitute an expropriation of his investment.

www.state.gov/r/pa/prs/ps/2011/01/154691.htm. Excerpts below discuss each of these conclusions. (Most footnotes have been omitted.) The tribunal's award is available at www.state.gov/documents/organization/156820.pdf

* * * *

85. This case poses an unusual situation. As relevant here, Grand River's business is centered on the manufacture of cigarettes at Grand River's cigarette plant at Ohsweken in Canada and their sale and export to two distributors in the United States. The three Grand River Claimants' most obvious and substantial investment—the manufacturing plant—is in Canada. One of the distributors—Arthur Montour, the fourth Claimant in this case—clearly is an investor with an investment in the United States. The other distributor—Tobaccoville—is an independent U.S. corporation that purchases Grand River's cigarettes and distributes them off reservation under the terms of a contract with Grand River. It is a U.S. owned and controlled entity. It is not, and could not be, claimed as part of the Claimants' investment.

86. The Claimants' position regarding the investment in the cigarette plant at Ohsweken, Ontario evolved over the course of the proceedings. The Claimants' pleading described their investment as including “millions of dollars ... to purchase truly state of the art equipment” for the manufacturing plant. The Claimants initially included \$38 million (later reduced to \$24 million) in lost investment in equipment in Ohsweken in calculating their damages claim. However, at the hearing, the Claimants' valuation expert expressed reservations about the accuracy of even the reduced figure, and the Claimants withdrew their \$24 million claim for damages in respect of their plant in Canada in their closing arguments at the hearing.

87. Prior NAFTA tribunals have held, following extensive briefing and argument, that they do not have jurisdiction over claims that are based upon injury to investments located in one NAFTA Party on account of actions taken by authorities in another. Chapter Eleven would be applicable only to investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party: absent those conditions, both the substantive protection of Section A and the remedies provided in Section B of Chapter Eleven are unavailable to an investor. Thus, the tribunal in *Canadian Cattlemen* found it lacked jurisdiction over a claimed NAFTA breach “where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investment in the territory of the United States of America.”

88. *Bayview Irrigation District v. United Mexican States* is similar. There, U.S. water right holders in the state of Texas alleged that water use authorized in Mexico impaired their U.S. investments. The claim was dismissed on the ground that NAFTA did not provide rights or protections “to investors whose investments are wholly confined to their own national states.” It was held in that case that a salient characteristic of an investment covered by the protection of NAFTA Chapter Eleven would be that the investment is primarily regulated by the law of a state other than the state of the investor's nationality, and that this law is created and applied by that state which is not the state of the investor's nationality.

89. The Tribunal finds the reasoning of these decisions persuasive here. The Claimants' investment in Grand River's cigarette plant in Canada does not satisfy the jurisdictional requirements of a claim under NAFTA Article 1101.

* * * *

122. The Claimants urged that in assessing whether they had an investment satisfying the requirements of NAFTA's Article 1139, the Tribunal should consider the totality of their

activities and not weigh each element in isolation. The Tribunal agrees. However, given the relatively restricted definition of “investment” under Article 1139, the Claimants must nonetheless establish an investment that falls within one or more of the categories established by that Article. Viewing the evidence of their activities in the aggregate in light of their claim for hundreds of millions of dollars, the Claimants have failed to show that Jerry Montour, Kenneth Hill and Grand River have an investment in the United States that qualifies as such within any of those categories. They have shown no investment in the United States by way of enterprise, loan, property or other interest conforming to the definition of Article 1139. Their claims, which relate to off-reservation sales of Grand River’s cigarettes, are therefore dismissed for lack of jurisdiction.

* * * *

126. ...In this section, the Tribunal addresses the claim of expropriation of Arthur Montour’s investment under NAFTA Article 1110, and the contention that the disputed measures are inconsistent with his reasonable and legitimate expectations, a contention also made to support his claim under NAFTA Article 1105.

A. The Question of the Claimant’s Reasonable Expectations

127. In his claims under both NAFTA Articles 1105 and 1110, Arthur Montour contended that the disputed measures, including the complementary legislation, were inconsistent with his reasonable investment-backed expectations. The Respondent agreed that the issue of an investor’s reasonable expectations can be relevant to a claim of regulatory expropriation under NAFTA Article 1110, but maintained that such expectations were not legally relevant to claims of denial of fair and equitable treatment under the customary law minimum standard of treatment under NAFTA Article 1105. Given this disagreement, the Tribunal addresses issues related to Arthur Montour’s reasonable expectations here, in the context of the Article 1110 claim, where both Parties recognize their potential relevance. The following discussion applies with equal weight to all of Arthur Montour’s arguments that his legitimate expectations were frustrated contrary to NAFTA’s Chapter 11.

* * * *

142. As to U.S. domestic law, given its unsettled nature in relevant respects, it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done. ... U.S. states had at least a colorable argument under domestic law for valid application of the MSA measures to his activities. By this observation the Tribunal is not expressing agreement with the argument in favor of state regulation. The point is that the relative strength of this argument and the range of relevant domestic judicial precedents were such that Mr. Montour was not in a position to reasonably harbor an expectation, upon which he would be entitled to rely under NAFTA, that he would be free from application of the MSA measures. The Tribunal believes, however, that Mr. Montour did have a reasonable expectation that he could pursue his challenge to the application of the MSA measures to his activities on the basis of U.S. domestic law in U.S. domestic courts, and the Tribunal understands that he in fact has done so.

143. Similarly, the Tribunal declines to resolve the opposing interpretations of the Jay treaty in relation to Arthur Montour's commercial activities. The Tribunal affirms the importance of the principle of *pacta sunt servanda* and acknowledges the significant and constructive roles treaties may have in securing the rights of indigenous peoples. The Tribunal also acknowledges the importance of the Jay Treaty for protecting cross-border movement and trade among indigenous peoples in North America. However, Mr. Montour asserts an absolute immunity from state regulation for commercial activities involving cross-border trade at a significant scale, and in doing so relies on an interpretation of the Jay Treaty that is not plainly supported by the text or easily and readily derived from application of accepted rules of treaty interpretation. What is readily apparent, instead, are the ambiguities in the meaning of the text in respect of the far-reaching claimed immunity, especially in light of the understandings and practice of the contemporary treaty parties, Canada and the United States, which are contrary to the Claimants' interpretation and which must be taken into account. ...

144. The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation.

145. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation. (As noted above, Native Wholesale Supply's sales on the Seneca Reservation in New York State are not at issue.)

B. Arthur Montour's Expropriation Claim

146. The Tribunal has jurisdiction over Arthur Montour's claim, including his claim that improper enforcement actions by various states other than New York affecting Native Wholesale Supply's sales have resulted in the expropriation of a substantial portion of the value of his investment. The Tribunal accordingly considers here whether the circumstances claimed involved an expropriation in violation of NAFTA Article 1110.

147. The starting point must be the language of Article 1110(1), providing that [n]o Party may directly or indirectly nationalize or expropriate *an investment* of an investor of another Party in its territory," unless certain conditions are met (emphasis added). The text speaks of "an investment," not "an investment or some portion thereof." The most natural reading of the language is that any act of expropriation will affect the totality of an investment. This is in harmony with the conception of expropriation applied in numerous cases—that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests.

148. Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment, and have rejected expropriation claims where (as here) a claimant remained in possession of an ongoing business. ...

154. The language of Article 1110 and the reasoning of numerous tribunals show that an expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests. The Claimant pointed to no cases supporting the notion that state action allegedly impairing only a limited portion of the value of an otherwise ongoing and profitable investment like Native Wholesale Supply can give rise to a "partial" expropriation under either NAFTA Article 1110 or general international law. ...

155. The Tribunal has been offered no reason to interpret the language of NAFTA's Article 1110(1) to mean other than it says. An act of expropriation must involve "the investment of an investor," not part of an investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence. Arthur Montour's expropriation claim fails for failure to establish an expropriation within the scope of Article 1110.

* * * *

156. The Claimants alleged that the Respondent has violated its obligations to assure national and most-favored-nation treatment under Articles 1102 and 1103 of NAFTA....

* * * *

169. However, the record does not establish that Arthur Montour's distribution business was subjected to enforcement measures that were not applied to other similarly situated businesses, or that other similarly situated investments received better treatment. Indeed, the Tribunal understands a core element of Mr. Montour's NAFTA claims to be that he and his distribution companies should not have been subject to the disputed measures applicable to other similarly situated investors and investments, because of his situation as a First Nations trader.

* * * *

173. The Claimants—and, as relevant here, Arthur Montour—contended that their treatment by various states of the United States violated the Respondent's obligation to accord fair and equitable treatment as required by NAFTA's Article 1105....

* * * *

180. In the Claimants' view, the content of the United States' obligations under Article 1105 is further shaped by U.S. obligations under the Jay Treaty, by principles of customary international law involving indigenous peoples, and by international human rights treaties and customary principles of human rights law. At the hearing, the Claimants' counsel urged that such international legal obligations were "relevant" in determining the obligations owed to these Claimants under Article 1105. In response to the Tribunal's question, counsel urged in this regard that the minimum standard of treatment was not a standard applicable to aliens generally, but that it varied to take account the varying status and legal rights of particular claimants.

181. The Tribunal has previously addressed aspects of this line of argument. While other legal rules may shape the context in which Article 1105 is applied, they do not alter the content

of the customary international law minimum standard of treatment. This follows from the very conception of the international minimum standard, which the Tribunal must apply pursuant to the Free Trade Commission's direction. The FTC directed that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment" that must be given to covered investments. This must be read in harmony with the Commission's further instruction that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

* * * *

208. *The Tribunal's Conclusions.* The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection. ...

209. Thus, neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments. Further, it has not been shown that either the text of Article 1105 or the customary minimum standard includes the more specialized prohibitions and requirements involving indigenous peoples invoked here, much less that those requirements have been breached as to Arthur Montour.

210. It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule. Moreover, a recent study by a committee of several international law experts assembled under the auspices of the International Law Association, after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning indigenous peoples, including "the right to be consulted with respect to any project that may affect them." As pointed out by the Claimants, the duty of states to consult with indigenous peoples is featured in the UN Declaration of the Rights of Indigenous Peoples, particularly in its Article 19 as well as in several other articles. In its Counter-Memorial the Respondent maintained in sweeping terms that the Declaration does not represent customary international law, as did Canada in its non-disputing party submission. However, when questioned by the Tribunal on this point at the hearing, the Respondents' counsel stated that some parts of the Declaration could reflect fundamental human rights principles and emerging customary law.

211. In any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community. Article 19 of the U.N. Declaration provides that "States shall consult with indigenous *peoples* through their own representative institutions" (emphasis added). It would go well beyond any articulation of the indigenous consultation norm, as well as far beyond its conceptual foundations as understood by the Tribunal, to hold that the norm obliges consultations with individual investors such as Arthur Montour, who does not purport to have been endowed with authority to represent the First Nations communities of which he is a member in regard to the matters at hand. At the hearing, the Claimants' counsel argued, without any written authority or testimony by someone with direct relevant knowledge, that in the customs of the Haudenosaunee, sovereignty resides with

the individual. Hence, as relevant here, Arthur Montour should be seen as the beneficiary of the customary international law obligation for governments to consult with indigenous communities. Thus, the argument went, NAFTA entitled him to be directly consulted before the states took any action affecting his investment. The Tribunal finds this particular argument unpersuasive and unsubstantiated.

* * * *

227. As presented in the Claimants' Memorial and Reply, [the denial of justice portion of the Article 1105] claim argued that state legislatures perpetrated a denial of justice by enacting the Escrow laws to require the Claimants to escrow funds as a condition for off-reservation sales of Grand River's cigarettes, even though those cigarettes had not been judicially determined to harm any person. Posed this way, the claim is outside the Tribunal's jurisdiction. It is precluded under Paragraph 103 of the Tribunal's July 2006 Decision on Jurisdiction, which found that the Claimants' claims relating to the original enactment of the Escrow Laws were untimely and barred by NAFTA's Articles 1116(2) and 1117(2).

228. However, at the hearing, the Claimants emphasized the more recent Allocable Share Amendments, urging that their off-reservation sales were injured only as Grand River's cigarettes lost off-reservation market share following the amendments, so that their enactment resulted in a denial of justice. The Tribunal does not have jurisdiction regarding the claims of Kenneth Hill, Jerry Montour and Grand River related to those off-reservation sales. Accordingly, the [denial of justice] Article 1105 Claim as it pertains to those sales is outside the Tribunal's jurisdiction and is dismissed.

229. The Claimants' Memorial did not clearly set out a separate claim of denial of justice or otherwise under Article 1105 specifically related to Arthur Montour. While he and his companies have been involved in litigation in various courts in the United States, he was not heard to contend that his treatment in that litigation has not conformed to Article 1105. Moreover, as noted above, the Claimants' written materials disavowed any intention to dispute the operation of the U.S. court system, a position presumably shared by Mr. Montour. Accordingly, the [denial of justice portion of the] Article 1105 claim as it pertains to Mr. Montour is also dismissed.

* * * *

b. U.S. Statement in Canadian Court Set-Aside Proceedings: Cargill v. United Mexican States

On January 31, 2011, the United States submitted a brief as intervenor in an appeal brought by Mexico in the Court of Appeal for Ontario, Canada. The appeal arose from a lower court decision denying Mexico's request to set aside a NAFTA Chapter 11 award made in favor of Cargill, Inc. Mexico asserted that the NAFTA tribunal erred in awarding damages to Cargill for losses incurred by its U.S. production business in the form of lost sales to its Mexican subsidiary. The United States submitted that the Canadian courts should recognize that the scope of damages in a NAFTA Chapter 11 case is limited by NAFTA Articles 1101, 1116 and 1139 to losses sustained by the claimant in its capacity as "investor," that is, in seeking to make, making, or having made an "investment"—as that term is defined in NAFTA Article 1139—in the respondent State's territory. As evidence of subsequent practice by the parties

under the Vienna Convention on the Law of Treaties demonstrating this understanding, the U.S. pointed to several previous submissions by each of the three NAFTA Parties recognizing this limit on the scope of damages. The full text of the U.S. submission is available at www.state.gov/documents/organization/156082.pdf.

c. Second U.S. Article 1128 submission: Mobil Investments Canada Inc. v. Canada

On January 28, 2011, the United States made a second Article 1128 submission in the NAFTA Chapter 11 arbitration, *Mobil Investments Canada Inc. v. Government of Canada*. Both U.S. Article 1128 submissions in *Mobil Investments* related to measures subordinate to non-conforming measures reserved in NAFTA Annex I. According to NAFTA Annex I, a Party's reserved measures include "any subordinate measures adopted or maintained under the authority of and consistent with the [reserved] measure." The first Article 1128 submission filed by the U.S. in 2010 argued that the measures reserved in a Party's Annex I or Annex III Schedule of non-conforming measures can include not only measures subordinate to the reserved measure that existed prior to the NAFTA's entry into force, but also subordinate measures that were adopted after the NAFTA's entry into force. See *Digest 2010* at 471-74. After the hearing on the merits of the case, the tribunal asked both the U.S. and Mexico to provide additional clarification on two points related to measures subordinate to non-conforming measures reserved in NAFTA Annex I: (1) whether national law or the law of NAFTA or both should be used to determine whether subordinate measures are consistent with the measures reserved in a Party's Annexes; (2) whether the subordinate measure can be considered consistent if it "imposes additional and/or more onerous burdens." Excerpts from the U.S. submission addressing these questions follow (with footnotes omitted). The full text of the submission is available at www.state.gov/documents/organization/155736.pdf.

* * * *

3. In the determination of whether a subordinate measure is "consistent with the measure" under which it was authorized, both the law of the NAFTA and national law are relevant.

4. NAFTA Article 1131 provides that a tribunal under Chapter 11 shall "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." With respect to the scope of non-conforming measure reservations in general, NAFTA Article 1132 permits a disputing Party to request that the NAFTA Free Trade Commission ("FTC") issue a binding interpretation on the issue of whether a challenged measure in a NAFTA Chapter 11 arbitration falls within the scope of a reservation or exception under Annex I. When a disputing Party does not seek an FTC interpretation pursuant to Article 1132, as in this case, the Tribunal must resolve any dispute over the scope of a reservation or exception under Annex I. In doing so, a Tribunal should apply standard treaty interpretation principles and interpret terms "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose," unless a "special meaning" was intended to apply to a term, in which case that "special meaning" shall be given effect. Vienna Convention on the

Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (“VCLT”), Arts. 31(1), 31(4).

5. “Consistent with” is not defined in the NAFTA. The ordinary meaning of the term “consistent” is “in accord,” “compatible,” or “without contradiction.” The term “measure” is provided with a “special meaning” in the NAFTA, defined in Article 201(1) as “any law, regulation, procedure, requirement or practice,” and the meaning of the “Measures” element of Annex I reservations is specified in Annex I(2)(f), as discussed below.

6. A subordinate measure must be both authorized by and consistent with the “measure,” in order to fall within the relevant reservation listed in Annex I. Because a measure is taken by a Party under its national law, the Tribunal must look to the national law context under which the subordinate measure in question was adopted or maintained to determine whether it is in fact authorized under and consistent with the relevant measure.

7. Whether a subordinate measure is consistent with a measure is also a question of the NAFTA because, when viewed in the context of NAFTA Article 1108 and Annex I, a “subordinate measure” falls within the definition of a “measure” that has been exempted from conforming to certain NAFTA obligations. Pursuant to NAFTA Article 1108(1)(a), each NAFTA Party has taken “reservations and exceptions” with respect to existing measures that do not conform with certain NAFTA articles. According to Article 1108 (1)-(2), each Party was to set out in its Schedule to Annex I “any existing non-conforming measure” for which it was taking a reservation to articles 1102 (national treatment), 1103 (most-favored nation treatment), 1106 (performance requirements), and 1107 (senior management and board of directors). *See also* NAFTA Annex I(1). “Existing” is defined under NAFTA Article 201(1) to mean “in effect on the date of entry into force of this Agreement.” Also exempted from one or more of the four obligations listed above are “the continuation or prompt renewal of any nonconforming measure” listed in Annex I or III and amendments to those non-conforming measures “to the extent that the amendment does not decrease the conformity of the measure” with the listed obligations. NAFTA Art. 1108(1)(b)-(c). Parties have also reserved in Annex II “sectors, subsectors, or activities” that would be exempt from the four NAFTA obligations, but which are not subject to the requirement that amendments may not “decrease the conformity” of the measure (Article 1108(1)(c)).

8. Reflecting the Parties’ desire to promote transparency, which is one of the key objectives of the NAFTA (*see* NAFTA Art. 102(1)), Annex I(1) provides for the scheduling of exceptions “with respect to existing measures that do not conform with obligations imposed by” any of the four obligations to which non-conforming measure entries may be taken. Annex I(2) further requires Parties to elaborate certain “elements” of the reservation, including the relevant economic sector, sub-sector, and industry classification (§§(a)-(c)); the obligation from which the measure is reserved (§(d)); the level of government taking the reservation (§(e)), the measure itself (§(f)); the description of any liberalization commitments for, and remaining non-conforming aspects of, the reserved measure (§(g)); and the phase-out commitment, if any was made (§(h)). Thus, in Annex I, the Parties not only describe the existing non-conforming measures for which they are taking reservations, but also identify the non-conforming aspects of these measures. Annex I(3) also sets out certain rules of interpretation for construing reservations, including rules of priority for considering the different elements, specifying that “all elements of the reservation shall be considered” and that the “reservation shall be interpreted in light of the relevant provisions of the Chapters against which the reservation is taken.”

9. Read in context, then, and in light of the object and purpose of the NAFTA, the consistency of a subordinate measure with the reserved measure must be determined by reference to the national law governing the measures and the NAFTA. For the NAFTA, considerations in relevant cases would include the context of the reservation the Parties negotiated, including the NAFTA obligation from which the listed measure is reserved and the degree of the reserve measure's and subordinate measure's non-conformity with that obligation, and in light of the other elements of the reservation that would be relevant.

* * * *

10. Regarding the Tribunal's second question, the extent to which the imposition of "additional and/or more onerous burdens" would impact the analysis of whether a subordinate measure is "consistent with" an existing non-conforming measure reserved in Annex I, we note that this phrase, "additional and/or more onerous burdens," is not found in the NAFTA. As described above in Question 1, the answer to this question in a specific case would be determined by reference to (i) the domestic legal context of the measure; (ii) the particular aspects of the non-conforming measure entry and the subordinate measure, including, *inter alia*, the extent of nonconformity of each with the obligation against which the measure is reserved; and (iii) the specific facts and circumstances of the case. Such a determination would be difficult to make in the abstract or as a general rule.

* * * *

d. Apotex, Inc. v. United States of America

In 2011, the United States fully briefed the jurisdictional issues in the arbitration under NAFTA Chapter 11 brought by Apotex, Inc., a Canadian pharmaceuticals corporation. On March 15, 2011, the United States submitted its Statement of Defense, available at www.state.gov/documents/organization/159488.pdf. On May 16, the United States submitted its Memorial on Objections to Jurisdiction, available at www.state.gov/documents/organization/169493.pdf. Excerpts follow from the U.S. Reply on Objections to Jurisdiction, submitted October 17, 2011, and available at www.state.gov/documents/organization/177623.pdf. The tribunal established to hear the case convened for a hearing on jurisdictional issues in February 2012.

* * * *

- (1) 2. Apotex Inc. (Apotex) is a Canadian manufacturer of generic drugs. The company has extensive facilities in Canada for developing, testing, producing, and labeling its drugs. By its own admission, "Apotex does not reside or have a place of business in the United States." Instead, Apotex exports its drugs from Canada to more than 115 countries around the world, including the United States, where they are sold by others.

(2) 3. Apotex alleges in this arbitration that it incurred substantial costs making abbreviated new drug applications (ANDAs) and complying with related regulatory standards in its testing, manufacturing, and labeling operations in Canada to allow export of its generic sertraline and pravastatin drugs to the United States. Apotex does not allege that the United States rejected its sertraline and pravastatin ANDAs. To the contrary, Apotex acknowledges that the U.S. government granted final approval of its ANDAs in 2006 and 2007, thereby allowing Apotex to export its drugs to the United States for sale by others. Nor does Apotex allege that it was the first applicant of “paragraph IV certifications” for generic sertraline or pravastatin drugs, making it eligible for 180 days of market exclusivity. Rather, Apotex challenged other companies’ 180-day market exclusivity of generic sertraline and pravastatin drugs, and claims that Apotex’s own generic drugs should have been available for sale in the United States just months earlier than was permitted. Apotex believes that this NAFTA investment tribunal is the appropriate forum to address that complaint.

(3) 4. This Tribunal lacks jurisdiction to hear Apotex’s claims, for three reasons. First, Apotex lacks standing to bring a claim under NAFTA Chapter Eleven. Apotex purports to be an “investor” that made “investments” in the territory of the United States, but it has produced no evidence to that effect, and its own pleadings affirmatively belie its conclusory statements.

(4) 5. Apotex asserts, without establishing, that an ANDA is an “investment” under Article 1139(g), because it constitutes “property” in the United States. Apotex’s claims, however, are not related to its approved ANDAs. Apotex thus asserts that its tentatively-approved applications for revocable permission to export its generic products to the United States for sale by others constitute property in the United States. Whether tentatively or finally approved, however, ANDAs are not “property” for purposes of NAFTA Chapter Eleven.

(5) 6. Apotex further claims to have made an “investment” as defined in Article 1139(h), which includes “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory[.]” Illustrative examples under Article 1139(h) include interests in a construction contract or a government concession. Apotex’s only evidence of these alleged “interests” consists of statements that the company (1) purchased goods in the United States for export to Canada for purposes of manufacturing its products there; (2) designated an agent and distributor to sell its products in the United States; and (3) incurred expenses from filing lawsuits in U.S. courts concerning its drug applications.

(6) 7. These activities, on their face, are not “interests” arising from the commitment of capital or other resources in the United States, and thus are not “investments in the territory of the United States” under NAFTA Chapter Eleven. Indeed, if a Canadian or Mexican exporter could transform itself into an “investor” with an “investment” in the United States simply by designating a U.S. agent and distributor, purchasing U.S. goods for export, and filing a lawsuit to further its cross-border trade, then presumably every such exporter

could bring its trade-related disputes to investment arbitration under the NAFTA. NAFTA Chapter Eleven, however, expressly defines the “investors” and “investments” entitled to protection so as to prohibit such bootstrapping. On the terms of Apotex’s own submission, it is not an investor that has made investments under NAFTA Chapter Eleven, and thus its claims should be dismissed in their entirety.

(7) 8. Second, regardless of whether Apotex qualifies as an “investor” or its activities were “investments” under the NAFTA, the Tribunal cannot hear Apotex’s pravastatin claim challenging a final ruling of the U.S. Food and Drug Administration (FDA), as that claim is time-barred. Apotex acknowledges that, in accordance with NAFTA Article 1116(2), it cannot bring a claim if more than three years have elapsed from the date on which it first acquired, or should have acquired, knowledge of an alleged breach and resulting loss or damage. Apotex further acknowledges that the challenged FDA measure occurred more than three years before Apotex brought its NAFTA claim. Apotex contends, however, that bringing a court action against a regulatory measure somehow revives or tolls claims based on that measure. Apotex has cited no support for this assertion, and, in fact, NAFTA Chapter Eleven tribunals have specifically rejected such an argument. Were it otherwise, any claimant could evade NAFTA’s clear and rigid limitations period by seeking judicial review of a challenged measure within three years of filing a NAFTA claim. Apotex’s argument thus must be rejected, along with its challenge to the FDA measure.

(8) 9. Third—again assuming for the purpose of argument that Apotex could meet the threshold for protection under the NAFTA as an investor—the Tribunal cannot hear Apotex’s challenge to the U.S. courts’ adjudication of Apotex’s pravastatin claim, because Apotex failed to obtain the judicial finality that is required before bringing an international claim. Apotex concedes that a claimant challenging a court action under NAFTA Chapter Eleven must obtain a final decision of the highest court of the host State, unless further judicial recourse would have been “obviously futile.” Apotex further concedes that after the U.S. Court of Appeals for the D.C. Circuit denied en banc Apotex’s petition for rehearing its motion for a preliminary injunction, Apotex could have sought certiorari from the U.S. Supreme Court or resumed its claim in the district court for a decision on the merits. Apotex contends, however, that such action would have been pointless, as the 180-day market exclusivity for generic pravastatin granted to another company likely would have run in 67 days, before either court could have given Apotex the relief it sought.

(9) 10. Apotex’s excuse is both insufficient and erroneous. Apotex cannot challenge non-final judicial acts under NAFTA Chapter Eleven unless it demonstrates obvious futility, not the improbability of success. Under international law, the question of whether the failure to obtain judicial finality may be excused for “obvious futility” turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.

(10) 11. As a factual matter, moreover, although the 180-day market exclusivity period had begun to run on the 10, 20, and 40 mg strengths of pravastatin, it had not begun to run on the 80 mg strength, and thus Apotex had ample time, at a minimum, to continue litigating its claim on the merits with respect to that strength. Apotex had two avenues to pursue further relief in U.S. courts, but chose instead to dismiss its claims voluntarily. Apotex's pravastatin claim based on judicial acts, therefore, must be dismissed.

(11) 12. For these reasons, and those set forth below, the Tribunal should dismiss Apotex's claims in their entirety for lack of jurisdiction, and award costs to the United States.

* * * *

2. Resolution of Cross-Border Trucking Dispute

On July 6, 2011, U.S. Transportation Secretary Ray LaHood and Mexican Secretary of Communication and Transportation Dionisio Arturo Pérez-Jácome Friscione signed a Memorandum of Understanding on Cross-Border Motor Trucking ("MOU"), aimed at resolving a long-standing dispute over implementation of the provisions of the NAFTA concerning cross-border long-haul trucking. The agreement is available at www.fmcsa.dot.gov/documents/Mexican_MOU_Eng.pdf. For background on the dispute, see *Digest 2010* at 474, *Digest 2009* at 418–19, and *Digest 2007* at 556–62. U.S. Trade Representative Ron Kirk issued the following statement when Mexico began lifting retaliatory tariffs shortly after the MOU was signed:

At President Obama's direction, the cross-border trucking dispute between the U.S. and Mexico has been resolved in a way that addresses safety concerns and upholds our trade obligations. With Mexico's announcement that it has cut tariffs on products exported from the U.S. by half, American manufacturers, farmers, ranchers, and companies will be able to better compete for customers in Mexico. Many of our workers build, grow and produce products that are then sold to our neighbors in Mexico, and this Administration is committed to expanding their opportunities to support well-paying jobs here at home and to continue rebuilding the U.S. economy.

Ambassador Kirk's statement is available at www.ustr.gov/about-us/press-office/press-releases/2011/july/statement-ambassador-ron-kirk-reduction-tariffs-us-ex. See also July 6, 2011 press release, available at www.ustr.gov/about-us/press-office/press-releases/2011/july/ustr-kirk-friday-mexico-drop-retaliatory-tariffs-fift.

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement. The following discussion of a selection of WTO disputes involving the United States is drawn largely from Chapter II, “World Trade Organization,” of the 2011 Annual Report of the President of the United States on the Trade Agreements Program (“2011 Annual Report”), available at www.ustr.gov/about-us/press-office/reports-and-publications/2012-0. WTO legal texts referred to below are available at www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. Disputes brought by the United States

(1) Disputes brought by the United States against China

(i) China—Measures Relating to the Exportation of Various Raw Materials (DS394)

As discussed in *Digest 2009* at 423-24, in 2009, the United States requested consultations with China, and then requested the establishment of a dispute settlement panel, regarding China’s export restraints on various raw materials used in the production of steel, aluminum, and chemicals. On July 5, 2011, the WTO panel circulated its report. The 2011 Annual Report (at 67) summarized the panel’s findings in the case as follows:

The panel found that the export duties and export quotas that China maintains on various forms of bauxite, coke, fluor spar, magnesium, manganese, silicon carbide, silicon metal, and zinc constitute a breach of WTO rules and that China failed to justify those measures as legitimate conservation measures, environmental protection measures, or short supply measures. The panel also found that China’s imposition of minimum export price, export licensing, and export quota administration requirements on these materials, as well as China’s failure to publish certain measures related to these requirements, is inconsistent with WTO rules.

China filed a notice of appeal on August 31, 2011. The Appellate Body is scheduled to provide its report at the end of January 2012.

(ii) Results of consultations requested in 2010 in three disputes with China

As discussed in *Digest 2010* at 475-78, the United States requested consultations with China on three matters during 2010. In two of the matters, consultations did not resolve the disputes and the United States requested the establishment of a panel. In February 2011, the United States requested the establishment of panels in *China – Certain Measures Affecting Electronic Payment Services (DS413)* and *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414)*. Panels were established in both disputes in March. In the third matter, *China—Subsidies on Wind Power Equipment (DS 419)*, the United States and China held consultations in February 2011 that led to the resolution of the dispute, as described in the 2011 Annual Report at 68:

“Following consultations, China issued a notice invalidating the measures that had created the program providing the challenged subsidies.”

(iii) New request for consultations: China—Countervailing and Anti-Dumping Duties on Chicken Broiler Products from the United States (DS427)

On September 20, 2011, the United States filed a request for consultations regarding China’s imposition of antidumping and countervailing duties on imports of chicken broiler products from the United States. The United States and China held consultations in October 2011, but were unable to resolve the dispute. On December 8, 2011, the United States requested the establishment of a panel. The 2011 Annual Report at 75 summarized the background of the dispute:

On September 27, 2009, China’s Ministry of Commerce (MOFCOM) initiated antidumping and countervailing duty investigations of imports of chicken broiler products from the United States. On September 26, 2010 and August 30, 2010, China imposed antidumping and countervailing duties, respectively. In the antidumping investigation, China imposed dumping duties ranging from 50.3 percent to 53.4 percent for the participating U.S. producers and exporters, and set an “all others” rate of 105.4 percent. In the countervailing duty investigation, China imposed countervailing duties between 4.0 percent and 12.5 percent for the participating U.S. producers and exporters and an “all others” rate of 30.3 percent.

In levying the antidumping and countervailing duties, China appears to have acted inconsistently with numerous WTO obligations. In particular, the United States is concerned that Chinese authorities failed to abide by applicable procedures and legal standards, including by finding injury to China’s domestic industry without objectively examining the evidence, by improperly calculating dumping margins and subsidization rates, and by failing to adhere to various transparency and due process requirements.

(2) Dispute brought by the United States against the European Union: *Subsidies on large civil aircraft* (DS316)

In this dispute dating back to 2004, the United States challenged subsidies provided to Airbus by the European Union, France, Germany, Spain, and the United Kingdom. For background, see *Digest 2004* at 603-4, *Digest 2005* at 622, and *Digest 2010* at 480-81. On June 1, 2011, the WTO’s Dispute Settlement Body (“DSB”) adopted the report of the Appellate Body, which affirmed the panel’s main findings in favor of the United States, with some modifications. Excerpts below from the 2011 Annual Report at 72 discuss the Appellate Body’s report and the EU’s compliance with the DSB rulings.

The Appellate Body affirmed the panel’s central findings that European government launch aid had been used to support the creation of every model of large civil aircraft produced by Airbus. The Appellate Body also confirmed that launch aid and other

challenged subsidies to Airbus have directly resulted in Boeing losing sales involving purchases of Airbus aircraft by easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Qantas – and lost market share, with Airbus gaining market share in the European Union and in third country markets, including China and South Korea at the expense of Boeing. The Appellate Body also found that the panel applied the wrong standard for evaluating whether subsidies are export subsidies, and that the panel record did not have enough information to allow application of the correct standard.

On December 1, 2011, the EU provided a notification in which it claimed to have complied with the DSB recommendations and rulings. On December 9, 2011, the United States requested consultations regarding the notification and also requested authorization from the DSB to impose countermeasures.

b. Disputes brought against the United States

(1) United States—Definitive Antidumping and Countervailing Duties on Certain Products from China (DS 379)

China initiated this dispute in 2008, challenging antidumping and countervailing duties imposed by the United States as a result of investigations on circular welded carbon quality steel pipe, certain pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks. After the panel found in favor of the United States in several respects in 2010, China appealed. The excerpt below from the 2011 Annual Report at 92-92 describes the proceedings on appeal in 2011.

* * * *

On December 1, 2010, China filed a notice of appeal of certain of the panel’s findings. China contended that: (1) the panel erred in its interpretation and application of the term “public body” in Article 1 of the SCM Agreement [the Agreement on Subsidies and Countervailing Measures]; (2) the panel erred in its interpretation and application of Article 2 of the SCM Agreement regarding Commerce’s specificity determinations; (3) the panel erred in its interpretation and application of Article 14(d) of the SCM Agreement and its finding that Commerce’s determination to reject in country private prices as benchmarks for measuring the benefit of government provided hot rolled steel was not inconsistent with that provision was erroneous; (4) the panel erred in its interpretation and application of Article 14(b) of the SCM Agreement and its finding that the benchmark Commerce used to measure the benefit of government provided loans was not inconsistent with that provision was erroneous; and (5) the panel erred in concluding that the concurrent application to imports from China of countervailing duties and antidumping duties calculated using an NME [non market economy] methodology was not inconsistent with the WTO obligations of the United States. The Appellate Body conducted an oral hearing on these issues on January 13-14, 2011.

The Appellate Body circulated its report on March 11, 2011. The Appellate Body reversed the panel’s finding with respect to the concurrent application of antidumping duties

calculated using a NME methodology and countervailing duties to imports from China, finding that the United States acted inconsistently with Article 19.3 of the SCM Agreement by failing to examine whether a “double remedy” arose from such concurrent application and by failing to avoid any such “double remedy.” The Appellate Body also reversed the panel’s finding with respect to the meaning of “public body” in Article 1.1(a)(1) of the SCM Agreement, finding that the term “public body” means an entity that possesses, exercises, or is vested with governmental authority. Using this definition, the Appellate Body completed the analysis and found that Commerce’s public body determinations with respect to SOEs [state owned enterprises] were inconsistent with Article 1.1(a)(1), while Commerce’s public body determinations with respect to SOCBs [state owned commercial banks] were not inconsistent with Article 1.1(a)(1). The Appellate Body also upheld the panel’s findings with respect to Commerce’s use of external benchmarks and Commerce’s specificity determinations.

On March 25, 2011, the DSB adopted its recommendations and rulings in this dispute. At the following DSB meeting, on April 21, 2011, the United States informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. The United States and China agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on February 25, 2012.

* * * *

(2) *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (DS381)*

Mexico requested consultations in 2008 regarding U.S. dolphin-safe labeling for tuna and tuna products. U.S. laws and regulations prohibit labeling tuna and tuna products as dolphin-safe if the tuna was caught using purse-seine nets intentionally set on dolphins, a technique Mexico uses. On September 15, 2011, the WTO panel established to examine these measures issued its report. A summary of the panel’s findings, available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#bkmk381r, is excerpted below.*

* * * *

This dispute concerns the following measures: (i) the United States Code, Title 16, Section 1385 (“Dolphin Protection Consumer Information Act”), (ii) the Code of Federal Regulations, Title 50, Section 216.91 (“Dolphin-safe labeling standards”) and Section 216.92 (“Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels”) and (iii) the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). These measures establish the conditions for use of a “dolphin-safe” label on tuna products. The measures condition the access to the US Department of Commerce official dolphin-safe label

* In January 2012, both Mexico and the United States notified the DSB of their decisions to appeal certain aspects of the panel’s report.

upon bringing certain documentary evidence that varies depending on the area where tuna contained in the tuna product is harvested and the fishing method by which it is harvested.

Mexico's main claims were that the measures were discriminatory, and that they were also unnecessary.

The Panel first determined whether the US dolphin-safe labelling provisions constitute a technical regulation under the TBT Agreement. The Panel found that they do, and in particular that the measures are mandatory within the meaning of Annex 1.1 of the TBT [Technical Barriers to Trade] Agreement. One of the members of the Panel expressed a dissenting opinion on this particular issue but sided with the majority for the rest of the report. The Panel then examined Mexico's claims under Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

The Panel rejected Mexico's first claim by finding that the US dolphin-safe labelling provisions do not discriminate against Mexican tuna products and are therefore not inconsistent with Article 2.1 of the TBT Agreement. Despite finding that Mexican tuna products are like tuna products originating in the United States or any other country within the meaning of Article 2.1 of the TBT Agreement, the Panel concluded that Mexican tuna products are not afforded less favourable treatment than tuna products of US and other origins in respect of the US dolphin safe labelling provisions on the basis of their origin.

With respect to Mexico's claim under Article 2.2 of the TBT Agreement, the Panel found that Mexico had demonstrated that the US dolphin-safe labelling provisions are more trade-restrictive than necessary to fulfil the legitimate objectives of (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and (ii) contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins, taking account of the risks non-fulfilment would create. The Panel's conclusion was based on the following two findings: (i) the findings that the US dolphin-safe labelling provisions only partly address the legitimate objectives pursued by the United States and (ii) the finding that Mexico had provided the panel with a less trade restrictive alternative capable of achieving the same level of protection of the objective pursued by the US dolphin-safe labelling provisions.

As regards Mexico's claim under Article 2.4 of the TBT Agreement, the Panel found that the US dolphin-safe labelling provisions are not in violation of such provision, which requires technical regulations to be based on relevant international standards where possible. Despite finding that the standard referred to by Mexico is a relevant international standard for the purposes of the US dolphin-safe provisions and that the United States has not used it as basis for its measures, the Panel concluded that this standard would not be appropriate or effective to achieve the US objectives.

The Panel declined to rule in addition on Mexico's non-discrimination claims under the GATT 1994 and therefore exercised judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT.

* * * *

(3) United States – Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386)

On November 18, 2011, a single panel issued its report on disputes brought separately by Canada and Mexico challenging U.S. country of origin labeling (“COOL”) requirements. Excerpts from the separate discussion of the Canadian and Mexican disputes in the 2011 Annual Report at 94-96 have been consolidated below to describe the panel’s findings.

* * * *

The final report found that the COOL measure (the COOL statute and USDA’s Final Rule together), in respect of muscle cut meat labels, breaches [Agreement on Technical Barriers to Trade] Article 2.1 because it affords Canadian [and Mexican] livestock less favorable treatment than it affords U.S. livestock. Under the Technical Barriers to Trade (TBT) Article 2.2, the panel found that the objective of the COOL measure was to provide consumers with information about the origin of the meat products that they buy at the retail level, and that consumer information on origin is a legitimate objective that WTO Members, including the United States, are permitted to pursue with their measures. However, the panel found that the COOL measure breaches TBT Article 2.2 because it fails to fulfill its legitimate objective of providing consumer information on origin with respect to meat products. The panel also found that the Vilsack Letter [a February 20, 2009 letter issued by the Secretary of Agriculture] breaches GATT Article X:3 because it does not constitute a reasonable administration of the COOL measure.

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The panel rejected Mexico’s claim under TBT Article 2.4 that the United States was required to base origin under the COOL measure on the principle of substantial transformation, concluding that using this principle would be an ineffective and inappropriate means to fulfill the U.S. legitimate objective of providing consumers with information about the origin of the meat products they buy. The panel also rejected Mexico’s claims under TBT Articles 12.1 and 12.3, concluding that the United States did not fail to take account of Mexico’s needs as a developing country Member.

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(4) United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399)

For background on this dispute, see *Digest 2010* at 486-87. On May 24, 2011, China filed a notice of appeal with respect to the panel’s report issued in 2010 finding that the U.S. duty on passenger vehicle and light truck tires imported from China did not violate the GATT 1994 or China’s Protocol on Accession. The Appellate Body upheld all of the panel’s findings in a report circulated on September 5, 2011.

(5) Zeroing

As discussed in *Digest 2010* at 487-90, the United States has taken steps to comply with findings adopted by the DSB in several disputes challenging the U.S. practice of “zeroing” in antidumping administrative reviews. Additional panel reports issued in 2011 also found the past practice of zeroing to be inconsistent with U.S. obligations. In *United States – Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (DS382)*, discussed in the 2011 Annual Report at 94, the panel found that the use of zeroing was inconsistent with the Antidumping Agreement. The DSB adopted the panel’s recommendations and ruling on June 17, 2011. The United States stated its intention to implement the recommendations and ruling. In *United States – Use of Zeroing in Antidumping Measures Involving Products from Korea (DS402)*, discussed in the 2011 Annual Report at 96-97, the panel circulated its report on January 18, 2011, finding that the United States’ use of zeroing methodology was inconsistent with its WTO obligations. On February 24, 2011, the DSB adopted the panel’s recommendations and rulings. The United States agreed to implement the recommendations and rulings and notified the DSB on December 19, 2011 that it had done so. In *United States – Anti-dumping Measures on Certain Shrimp from Vietnam (DS404)*, discussed in the 2011 Annual Report at 97-98, the panel issued its report on July 11, 2011 finding the use of zeroing to be inconsistent with the Antidumping Agreement and the GATT 1994. On September 2, 2011, the DSB adopted the panel’s recommendations and rulings. The United States stated its intention to comply with the recommendations and rulings within a reasonable period.

2. WTO Accession: Russia, Samoa, Montenegro, and Vanuatu

On December 16, 2011, trade representatives at the 8th Ministerial Conference of the World Trade Organization adopted the terms and conditions for Russia’s accession to the WTO and invited Russia to join the organization. For more information on the terms for Russia’s accession, see www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm. The United States strongly supported Russia’s accession to the WTO. President Obama congratulated Russian President Dmitri Medvedev prior to the 8th Ministerial Conference when the negotiations on terms and conditions for accession were concluded on November 10, 2011, saying:

Since the beginning of my administration, and with increased intensity after President Medvedev and I met in Washington in June 2010, I have supported Russia’s WTO accession. Russia’s membership in the WTO will lower tariffs, improve international access to Russia’s services markets, hold the Russian Government accountable to a system of rules governing trade behavior, and provide the means to enforce those rules.

Daily Comp. Pres Docs. 2011 DCPD No. 00848, p. 1.

United States Trade Representative Ron Kirk said in a statement released the same day as the action at the 8th Ministerial Conference: “Russia’s accession is good for the United States, good for Russia, and good for the WTO. This marks an important turning point in making the WTO truly a ‘world’ trade organization.” December 16, 2011 USTR Press

Release, available at www.ustr.gov/about-us/press-office/press-releases/2011/december/us-trade-representative-kirk-welcomes-invitation. USTR also issued a fact sheet, excerpted below and available at www.ustr.gov/webfm_send/3212, listing the benefits of Russia's accession.

The United States also welcomed the approval in 2011 of terms for accession by Samoa, Montenegro and Vanuatu. See December 17, 2011 USTR Press Release, available at www.ustr.gov/united-states-welcomes-invitations-montenegro-samoa-join-world-trade-organization-0.

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This decision of the Ministerial Conference represents the substantive conclusion of 18 years of negotiations. Those negotiations have generated results that will liberalize Russia's market through a reduction in tariffs for imports of goods and agreed terms for access to Russia's market for services. In addition, and of critical importance, the terms of Russia's WTO accession spell out the way in which Russia will apply and implement all elements of the WTO "rule book," including in areas of critical importance to U.S. exporters and workers.

Key benefits arising from Russia's membership in the WTO include:

- **A Stronger Mechanism for U.S.-Russia Trade Relations**: Russia is the largest nation to remain outside the WTO, and its WTO membership will link Russia to the same set of rules that apply to 153 other Members. This will afford U.S. trade policymakers with a new and critical set of tools to ensure fair and rules-based treatment of U.S. exports.
- **Reduced Russian Tariffs on Key U.S. Exports**: As part of its WTO accession Russia will bind its tariffs on all products. In addition to joining the Information Technology Agreement, Russia is making meaningful commitments to cut tariffs in important export sectors such as chemicals, civil aircraft, agriculture equipment, construction equipment, and medical equipment, as well as dairy, grains, oilseeds, horticultural products, wine, and meat.
- **More Liberal Russian Treatment for U.S. Services Exports**: Russia is undertaking enforceable market access commitments covering services sectors that are priorities for the United States, including audio-visual, telecommunications, financial services (including insurance, banking and securities), energy services, computer services and retail services.
- **Firm Commitments for the Protection and Enforcement of Intellectual Property Rights**: In joining the WTO, Russia will implement with immediate and enforceable effect all provisions of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). Due to U.S. engagement with Russia over recent years, Russia has already amended its domestic laws to comply with the TRIPs Agreement. As a WTO Member, Russia will be required to enforce those laws in compliance with relevant WTO provisions.
- **Enforceable Disciplines to Ensure Rules-Based Treatment of U.S. Agricultural Exports**: The terms of Russia's accession contain extensive commitments ensuring Russia's compliance with WTO rules on sanitary and phytosanitary (SPS) measures, providing U.S. exporters of meat and other agricultural products with an enforceable set of disciplines against trade restrictions that are not science-based. As part of joining the

WTO, Russia and its Customs Union partners Kazakhstan and Belarus have developed an entirely new and WTO-consistent legal framework to ensure consistency with WTO SPS rules. Russia will be applying these rules from “day one” of its WTO membership.

- **Improved Transparency in Trade-Related Rule-Making:** Russia’s WTO accession package contains important disciplines governing transparency in the development of trade policies and measures, including publication of draft rules and opportunities for public comments on those rules prior to their adoption.

* * * *

3. Conclusion of revised WTO Government Procurement Agreement

Also at the 8th Ministerial Conference of the WTO in December 2011, the ministers representing parties to the WTO Government Procurement Agreement (“GPA”) reached agreement on revisions to the text of the GPA and expansion of its coverage. A USTR Fact Sheet, excerpted below and available at www.ustr.gov/about-us/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur, identified benefits of the revised GPA. For more information on the GPA, see www.wto.org/english/news_e/news11_e/qpro_15dec11_e.htm.

* * * *

New Opportunities with Central Government Entities

The revised agreement will give U.S. suppliers access to more than 150 additional central government entities in European Union Member States, including Bulgaria, Finland, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Romania, and Sweden.

U.S. suppliers will also gain access to a number of additional central government entities in other GPA Parties, including in Aruba, Hong Kong, Israel, Liechtenstein, Korea, and Switzerland. U.S. suppliers will also gain new market access through the reduction of thresholds – the monetary value below which contracts are not covered—in several Parties, including Israel, Japan and Aruba.

New Opportunities with Sub-Central Government Entities

GPA Parties including Japan, Korea, and Israel have added a number of sub-central entities. Canada is providing access to its provinces for the first time under the revised GPA. (The United States has been able to participate in Canadian provincial procurement since February 2010 when it signed a bilateral agreement with Canada.)

New Opportunities with Government Enterprises

The GPA Parties will also expand the government enterprises that they cover under the GPA. This will include new enterprises in Israel such as the Environmental Services Company and development companies, as well as new entities from Japan, Korea, Liechtenstein and Chinese Taipei.

New Opportunities in Services Sectors

Already-competitive U.S. services suppliers will find new opportunities with the addition of more than 50 categories of services in Aruba, Hong Kong, Israel, Japan, Korea, Singapore,

and Switzerland. This includes complete coverage of the telecommunications sector in several Parties.

Phase-out of Israel's Requirements for Domestic Content

A major achievement of the negotiations is Israel's commitment to phase out the offsets—requirements for domestic content—that it has maintained since 1981. Over 15 years, Israel will progressively reduce its application of these offsets to zero from the current 20%, reduce the number of entities that apply offsets, and set a threshold below which offsets will not be applied.

Support for Modern Business Practices in Government Procurement

The modernized text updates the GPA to incorporate current procurement practices, in particular through the use of electronic procurement in GPA member countries. It significantly clarifies GPA requirements, increases transparency of procurement practices through electronic methods, provides more flexibility for procuring entities, especially when buying commercial (off-the-shelf) goods and services, and promotes the adoption of such practices in potential future member countries. The revised GPA specifies the transitional measures for developing countries, which should facilitate the accession of developing countries to the GPA.

U.S.-EU Bilateral Procurement Forum

In conjunction with the conclusion of the GPA revision, the United States and the European Union will establish a Bilateral Procurement Forum that will provide an opportunity to expand our procurement relationship on a bilateral basis. Under this Forum, we will take up procurement regulatory issues and international procurement issues, such as China's accession to the GPA—a key priority for both sides. In addition, the United States and the EU will explore the possible expansion of procurement commitments, primarily on a national treatment basis. The United States will only cover procurement of sub-central entities, such as states, with that entity's authorization.

Maintaining Priorities for Small and Minority Firms

Under the revised Government Procurement Agreement, the United States maintains all of its current exclusions and exceptions, including its exclusion of set-asides for small and minority firms.

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D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Legislation and Trade Preferences

a. Generalized System of Preferences

On October 21, 2011, President Obama signed legislation authorizing the Generalized System of Preferences ("GSP") program through July 31, 2013 and retroactively applying GSP trade benefits for eligible products that entered the United States on or after January 1, 2011. Pub. L. 112-40. Congress created the GSP program in the Trade Act of 1974, 19 U.S.C. 2461 et seq., to help developing countries expand their economies by allowing certain goods to be imported to the United States duty free. Under the GSP program, 129 beneficiary developing countries, including 42 least-developed countries, are eligible to export up to 4,881 types of products to the United States duty-free. After the GSP program

was reauthorized in 2011, USTR completed its 2010 Annual Review of the program and granted one petition for removal of a product (certain non-down sleeping bags) and denied one petition for removal of another product (two types of self-adhesive plastic tape) from eligibility for duty-free treatment under the GSP program. 77 Fed. Reg. 1549 (Jan. 10, 2012). See USTR December 29, 2011 Press Release, available at www.ustr.gov/about-us/press-office/press-releases/2011/december/ustr-announces-outcome-generalized-system-preference.

b. African Growth and Opportunity Act

On October 25, 2011, President Obama signed a presidential proclamation designating Cote d'Ivoire, Guinea, and Niger as eligible for benefits under the African Growth and Opportunity Act ("AGOA"), title I of Public Law 106-200. Daily Comp. Pres. Docs. 2011 DCPD No. 00790, p. 1. AGOA amended the Trade Act of 1974, 19 U.S.C. § 2462, to authorize the President to designate certain listed countries as a "beneficiary sub-Saharan African country" if the President determines that the country meets certain eligibility requirements in the AGOA and the Trade Act of 1974.

In December 2011, United States Trade Representative Ron Kirk announced that all 40 of the countries then eligible for benefits under AGOA would remain eligible in 2012. USTR December 29, 2011 Press Release, available at www.ustr.gov/about-us/press-office/press-releases/2011/december. As explained in the USTR Press Release, criteria for eligibility for benefits under AGOA include:

establishing, or making continual progress towards establishing, a market-based economy, rule of law, economic policies to reduce poverty, protection of internationally recognized worker rights, and efforts to combat corruption. Countries eligible for AGOA also may not engage in activities that undermine U.S. foreign policy interests, or engage in gross violations of internationally recognized human rights.

2. Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR")

The text of the CAFTA-DR is available at www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

a. Meeting of the CAFTA-DR Free Trade Commission

The first meeting of the CAFTA-DR Free Trade Commission was held on February 22-23, 2011, in San Salvador, El Salvador. The parties released a joint statement at the conclusion of the meeting, excerpted below. The full text is available at www.ustr.gov/about-us/press-office/press-releases/2011/february/joint-statement-meeting-dominican-republic-centra.

At the CAFTA-DR Free Trade Commission (FTC) meeting today, we celebrated the five year anniversary since El Salvador and the United States implemented the Agreement. Despite the economic challenges faced by the global economy in recent years, total (two way) trade between the United States and the Central American partners and the Dominican Republic grew from \$35 billion in 2005 prior to the implementation of the agreement to \$48 billion in 2010. Intra-regional trade among the Central American countries and the Dominican Republic increased from \$4.2 billion to over \$6.3 billion over the same period. Foreign investment flows in the region are even more remarkable. The average annual investment inflows into the Central American countries and the Dominican Republic in the first four years of the Agreement were \$6.3 billion, or 123 percent higher than the \$2.8 billion annual average during 2000-2005 before implementation.

* * * *

To expand and broaden the benefits of the Agreement and support jobs in our respective countries, we agreed to cooperate on several new initiatives. We endorsed regional trade facilitation initiatives to foster greater regional integration, enhance competitiveness and expand the benefits of the trade agreement, with special attention to promoting greater participation by SMEs [Small and Medium-sized Enterprises].

We welcomed the inventory of trade facilitation projects prepared with the support of the Inter-American Development Bank, which will facilitate future discussions and activities. We thanked the Inter-American Development Bank for the valuable support that it has provided thus far as part of this phase and we requested their continued support as we move forward with the second phase of this effort. Therefore, we instructed our senior officials to undertake a process of consultation with stakeholders and self assessments to identify remaining challenges and to share best practices, including policies, programs and practices that countries can adopt to facilitate trade.

We have identified initial cooperative actions in the context of the CAFTA-DR Trade in Goods and Technical Barriers to Trade Committees to be implemented in the short term. We look forward to identifying further cooperative endeavors and to receiving a report on progress at the next Free Trade Commission meeting.

Recognizing the essential role that SMEs play in creating jobs in all of our countries, we discussed ways to help SMEs take advantage of the export opportunities that the Agreement provides. One of the challenges that SMEs face is access to relevant information on the opportunities that the Agreement offers and how to pursue these opportunities. To help address this, we released a brochure entitled “[Frequently Asked Questions About Opportunities for Small Businesses to Export in the CAFTA-DR Region](#)”, a publication designed to answer basic questions for firms that are considering exporting for the first time. This document will be available on each of our websites in both Spanish and English.

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Recognizing the critical importance of trade in agricultural products and the jobs and workers that are sustained by agriculture in all our countries, we formally established the Committees on Agricultural Trade and Sanitary and Phytosanitary (SPS) Matters as required by the Agreement. These committees will lead the way in promoting cooperation and communication between our countries on the implementation of our obligations so that our

respective agricultural sectors can realize fully the opportunities offered by the CAFTA-DR Agreement.

We approved a series of changes to the Agreement's rules-of-origin for textile and apparel goods that will facilitate regional trade and integration. These changes will expand opportunities under the CAFTA-DR Agreement and encouraging a vibrant textile and apparel supply chain in the Western Hemisphere to effectively face the challenge that Asian competitors represent.* We also agreed to increase the cumulation limits to encourage greater integration of regional production through limited reciprocal duty-free access with Mexico and Canada to be used in Central American and Dominican Republic apparel, as called for under the Agreement.

We established four rosters of potential panelists for disputes that may arise under the Agreement concerning general matters, as well as under the labor or environment chapters or financial services provisions of the Agreement. We also established model rules of procedure for dispute settlement panels and a code of conduct for panelists to guide dispute settlement proceedings under the Agreement.

* * * *

b. Labor: Request for Arbitral Panel on Guatemala Labor Practices

On August 9, 2011, the United States requested the establishment of an arbitral panel pursuant to the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR") to consider whether the Government of Guatemala was complying with its obligations under Article 16.2.1(a) of the CAFTA-DR. Request for Arbitration, available at www.ustr.gov/webfm_send/3042. The dispute concerns Guatemala's apparent failure to meet its obligations under the CAFTA-DR with respect to the effective enforcement of its labor laws. The United States had availed itself of other procedures under the CAFTA-DR before resorting to the request for a panel. The dispute arose in April 2008 after the AFL-CIO and six Guatemalan worker organizations filed a public submission under the CAFTA-DR alleging that the Guatemalan government had violated its CAFTA-DR labor commitments. The U.S. Government reviewed the submission and then conducted its own examination—including collection of evidence and legal analysis—of Guatemala's compliance with its commitments under the CAFTA-DR labor chapter. Based on that examination, the U.S. Government concluded that Guatemala appeared to be failing to meet its obligation with respect to enforcement of labor laws.

* Editor's note: According to the Office of the U.S Trade Representative, one of the most significant changes was the clarification that certain monofilament sewing thread is now required to originate or be produced in the United States or the CAFTA-DR region in order for goods to qualify for preferential treatment. See May 2011 USTR Fact Sheet, "CAFTA-DR Textiles," available at www.ustr.gov/about-us/press-office/fact-sheets/2011/may/cafta-dr-textiles.

In 2010, the U.S. attempted to resolve the dispute by requesting consultations under chapter 16 (labor) of the CAFTA-DR. See *Digest 2010* at 492-94 for background and excerpts from the request for consultations. Consultations failed to resolve the dispute and, in May 2011, the U.S. requested that the Free Trade Commission meet to resolve the dispute. See Press Release announcing request for FTC meeting, available at www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-kirk-seeks-enforcement-labor-laws-guatemala.

The Free Trade Commission met in June and intense work ensued to attempt to reach an agreement on an adequate enforcement plan, but those efforts did not succeed. In announcing that the U.S. would be taking the next step in the dispute, Ambassador Kirk stated:

With this case, we are sending a strong message that the Obama Administration will act firmly to ensure effective enforcement of labor laws by our trading partners. While Guatemala has taken some positive steps, its overall actions and proposals to date have been insufficient to address the apparent systemic failures. We need to see concrete actions to protect the rights of workers as agreed under our trade agreement, and we are prepared to act to obtain enforcement of those rights when and where necessary.

The full text of the announcement is available at www.ustr.gov/about-us/press-office/press-releases/2011/august/us-trade-representative-ron-kirk-announces-next-ste.

c. *Dispute Resolution: Submission of the U.S. in Pac Rim v. El Salvador*

On May 20, 2011, in an arbitration brought under CAFTA-DR Chapter 10, the United States made a submission pursuant to Article 10.20.2 on a question of interpretation of CAFTA-DR in *Pac Rim Cayman LLC v. El Salvador* (ICSID Case No. ARB/09/12). Claimant Pac Rim Cayman LLC is a gold mining company that incorporated in the Cayman Islands. It became a Nevada company in a December 2007 corporate restructuring. In the Notice of Arbitration, filed on April 30, 2009, Claimant alleged that El Salvador violated obligations under CAFTA-DR Articles 10.3 (national treatment), 10.4 (most-favored-nation treatment), 10.5 (minimum standard of treatment) and 10.7 (expropriation). Claimant sought damages in excess of \$77 million in connection with measures, including environmental permits and exploitation concessions, allegedly adversely affecting Claimant's exploitation of gold resources in El Salvador. The U.S. submission on interpretation of the CAFTA-DR is excerpted below (with most footnotes omitted) and available in full at www.state.gov/documents/organization/164308.pdf.

4. The United States hereby addresses two issues of treaty interpretation related to CAFTA-DR Article 10.12.2: first, whether a CAFTA-DR Party is required to invoke the denial of benefits provision under Article 10.12.2 before arbitration commences; and second, whether the notice provision under CAFTA-DR Article 18.3, which is referenced in Article 10.12.2, requires the Party to give notice to the claimant as well as to the Party under the law of which the claimant is constituted or organized.

A CAFTA-DR Party Is Not Required To Invoke The Denial Of Benefits Provision Under Article 10.12.2 Before Arbitration Commences

5. Article 10.12.2 imposes two substantive requirements that must be met before the provision can be invoked by a CAFTA-DR Party; specifically, an enterprise must (1) have no substantial business activities in the territory of any Party other than the denying Party, and (2) be owned or controlled by persons of a non-Party or of the denying Party. Article 10.12.2 does not impose any requirement, however, with respect to *when* a respondent may invoke the denial of benefits provision. Neither this Article nor any other provision of CAFTA-DR precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional defense after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement.⁸ There is no basis to read into the plain language of Article 10.12.2 a requirement that a Party assert its right to deny benefits before the commencement of arbitration.

6. Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party. It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territories of each of the other six CAFTA-DR Parties that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in those countries. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring CAFTA-DR Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision.

7. Similarly, there is no basis in the plain language of CAFTA-DR to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration. Article 10.16.2, for example, requires that a notice of intent include a claimant's "name and address," but Article 10.16.2 does not require a claimant to disclose the extent of the claimant's business activities in the territory of any CAFTA-DR Party or the names of any persons or entities that own or control the claimant enterprise.

8. For the above reasons, there is no reasonable basis under any applicable rule of treaty construction to read into the text of Article 10.12.2 a requirement to invoke the denial of benefits provision before arbitration commences.

Neither Article 10.12.2 nor Article 18.3 Requires Notice To Claimants

9. Under Article 10.12.2, a CAFTA-DR Party's denial of benefits is "subject to" Article 18.3, the provision that delineates notification requirements for CAFTA-DR Parties. Paragraph 1 of Article 18.3 provides:

⁸ See CAFTA-DR, art. 10.12.2. Under Article 10.12.2, "a Party may deny the benefits of this Chapter." As such, a CAFTA-DR Party may invoke Article 10.12.2 to deny the benefits of both the substantive provisions and the dispute settlement provisions of Chapter Ten.

To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.

10. On its face, Article 18.3 requires a CAFTA-DR Party, to the maximum extent possible, to provide notice to one or more other CAFTA-DR Parties of certain "proposed or actual" measures as described in the provision. There is no mention of notice to claimants in Article 18.3, and none is required.

* * * *

3. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

The United States has availed itself of the dispute resolution provisions under the 2006 Softwood Lumber Agreement ("SLA") in three separate proceedings. Documents related to these proceedings are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement. One of these disputes was resolved by the 2009 award of a London Court of International Arbitration ("LCIA") tribunal. See *Digest 2009* at 442-44. The other disputes, which were ongoing in 2011, are discussed below. See *Digest 2006* at 762-63 for an overview of the SLA. The text of the SLA is available at www.state.gov/documents/organization/107266.pdf and amendments and annexes are available at www.state.gov/documents/organization/107267.pdf.

a. Award in arbitration on provincial subsidies: Case No. 81010

On January 20, 2011 a tribunal of the LCIA ("Tribunal") issued an award in favor of the United States, finding that Canada had violated the anti-circumvention provision of the SLA. *United States of America v. Canada*, LCIA, Case No. 81010. For prior developments in the arbitration, see *Digest 2009* at 444 and *Digest 2008* at 589-93. The Tribunal summarized its findings and award as follows:

- The Respondent **breached the anti-circumvention clause in Article XVII(1)** of the SLA by reason of the following programs or measures: (1) Ontario's Forest Sector Prosperity Fund; (2) Ontario's Forest Sector Loan Guarantee Program; (3) Québec's Forest Industry Support Program (PSIF); (4) Québec's Capital Tax Credit; and (5) Québec's Road Tax Credit (only in connection with the increase in tax credit from 40% to 90%);
- The Respondent shall have a period of 30 days from the notification of this Award to cure, through means of its own choosing, the breaches identified in the preceding paragraph;
- If the Respondent does not cure the breaches within the period identified in the preceding paragraph, the Compensatory Adjustments determined in paragraphs 410 - 411 above of this Award shall apply;
- Pursuant to Article XIV(21) of the SLA, the costs of these proceedings, which amount to US\$ 1,152,876.93, shall be paid from the funds allocated to the binational industry

council for this purpose;

- Pursuant to Article XIV(21) of the SLA, each Party shall bear its own costs, including legal fees and other expenses;
- All other claims are dismissed.

Award, available at www.ustr.gov/webfm_send/2573. In its press release about the award, available at www.ustr.gov/about-us/press-office/press-releases/2011/january/united-states-wins-softwood-lumber-arbitration, USTR explained what would be required if Canada did not cure the breaches within the 30 day period:

Canada must impose, as an appropriate adjustment to compensate for the breach, additional charges on exports of softwood lumber to the United States originating in Quebec and Ontario. These additional export charges will remain in place for the duration of the SLA and it is anticipated that they will result in the collection of US \$59.4 million.

b. *New U.S. request for arbitration on under-pricing of timber: Case No. 111790*

On January 18, 2011, the United States requested arbitration at the LCIA, regarding the under-pricing of timber harvested from public lands in the Interior region of British Columbia. United States Trade Representative Ron Kirk explained:

Canada is providing an additional benefit to Canadian exporters of softwood lumber by selling timber harvested from public lands for prices below those provided for under the timber pricing system grandfathered under the SLA. By doing so, Canada is in breach of its commitments under the Agreement. This type of benefit harms U.S. workers and firms in the lumber industry, and is inconsistent with Canada's obligations under the 2006 Softwood Lumber Agreement. ...

USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2011/january/united-states-requests-arbitration-canada-under-so. The dispute involves the assignment of public timber to the salvage "grade 4," which British Columbia then sells to Canadian softwood lumber producers at the low fixed rate of 25 cents per cubic meter.

In 2010, the United States had requested formal consultations with Canada on the issue. See *Digest 2010* at 495. Consultations were held in 2010 but did not resolve the matter. After requesting arbitration in January, the United States submitted its Statement of Case on August 9, 2011. Excerpts follow (with footnotes and references to other submissions in the case omitted) from the Statement of Case, which is available in full in its non-confidential version at www.ustr.gov/webfm_send/3053.

* * * *

2. Since early 2007, Canada's largest softwood lumber exporting province has systematically underpriced timber harvested from Crown forests and sold it to Canadian lumber producers in breach of the 2006 Softwood Lumber Agreement ("SLA" or "Agreement"). In the SLA, Canada promised the United States one of two things regarding "stumpage" fees that British Columbia ("BC" or "the BC government") charges lumber producers for Crown timber: BC either would apply its newly-reformed timber pricing system to reflect its suitability for producing lumber, or if BC modified its system, it would do so in a way that maintained or improved the extent to which its stumpage fees reflect market conditions. BC did neither of these things. Instead, it ran in the opposite direction from market conditions by selling large volumes of lumber-quality timber for C\$0.25 per cubic meter, the fixed minimum price generally reserved for "reject" logs incapable of producing lumber. This was a breach of the SLA.

3. Over 90 percent of the forests in BC are owned by the provincial government. Under its timber pricing system, BC charges lumber companies a fee, known as "stumpage, for timber harvested from Crown forests. Stumpage fees are based on the timber's "grade"—an evaluation of the timber's suitability for manufacture into lumber. Before April 2006, the BC system had automatically graded *all* timber affected by the mountain pine beetle ("MPB timber") as lumber "reject" priced at the minimum stumpage fee, even though most beetle-affected timber can be used to produce merchantable lumber. This, of course, was a tremendous competitive advantage for Canadian lumber companies harvesting MPB timber for the manufacture of their lumber products.

4. While Canada and the United States were negotiating the SLA in 2006, BC agreed to reform its pricing system to address predicted increases in MPB timber. Under the reforms, BC would sell its timber at prices that reflect whether the timber could be used to make lumber, not whether the timber was affected by the mountain pine beetle. The reforms recognized that the mountain pine beetle does not impair the quality of timber, which still can be used to produce lumber, and therefore recognized that BC should not sell all MPB timber for the minimum stumpage fee. BC anticipated that most MPB timber would be sold as lumber-quality. The calibrated new system, which also adjusted the timber price to reflect the effects of the mountain pine beetle, was a critical component of the SLA and of great importance to the United States, which had been concerned for years about BC's pricing system.

5. In April 2006, BC reformed its timber grading rules with the stated intent of pricing MPB timber in a way that reflects its suitability for use in making lumber. Shortly thereafter, Canada announced that the two governments had reached an agreement on the general terms of the SLA.

6. The SLA, effective as of October 2006, grandfathered the reforms made part of BC's timber pricing system. Although the SLA permitted BC to change the system, any changes had to maintain or improve the extent to which timber prices reflect market conditions for BC to avoid a breach.

7. But after reforming its system in 2006, BC quickly abandoned the new reforms beginning in early 2007, almost exactly when the North American housing and softwood lumber markets began to precipitously decline, driving the price of lumber down. BC resumed selling MPB timber for the minimum stumpage fee, to the enormous benefit of BC lumber producers and exporters; and in breach of the SLA.

8. Canada acknowledges that MPB timber can be used to manufacture merchantable lumber. The province's own commissioned studies of lumber recovery from MPB timber

uniformly demonstrate this. More recently, Vancouver showcased MPB lumber during the 2010 Winter Olympic Games by constructing its speedskating venue using one million board feet of lumber made primarily from MPB timber. Yet soon after BC enacted its reformed system, and just months after the two governments entered into the SLA, BC restored the windfall that it previously had given BC lumber producers and exporters for MPB timber under the pre-April 2006 system. When those producers and exporters then sell lumber made from the cheaply-purchased timber, they recover substantially more money than they could have had they purchased the timber under the reforms grandfathered by the SLA. By its actions, BC has provided its lumber industry benefits approaching C\$500 million. Because these benefits breach the SLA, the United States has brought this arbitration proceeding to require Canada to remedy its breach.

I. Relevant Provisions Of The SLA

A. The United States Negotiated For A System Of Export Measures

9. The SLA entered into force on October 12, 2006, and resolved the decades-long series of disputes over Canadian softwood lumber exports into the United States. As part of the SLA, the United States agreed to cease collection of antidumping and countervailing duties imposed under its domestic laws and to refund US\$5 billion in deposits of duties that it had collected on Canadian softwood lumber entering the United States since May 2002.

10. In exchange, Canada agreed to apply Export Measures—export charges and volume limitations—to shipments of softwood lumber from Canada into the United States when the price of lumber products falls below a certain level. The price of lumber products has remained low since the inception of the Agreement in October 2006, and thus the Export Measures have been in effect almost every month in which the SLA has been in force.

11. The Agreement gave Canada's different lumber producing regions, including BC Interior, a choice regarding the types of Export Measures to which they would be subject. Regions selecting Option A chose to pay only an export charge and would not be subjected to a volume restraint. Regions electing Option B chose to pay a smaller export charge in combination with a volume restraint. BC Interior chose Option A, meaning that it has never been subject to a volume restraint. Rather, BC Interior may export as much softwood lumber to the United States as it wishes, so long as it pays the required export charges.

12. The Export Measures are a critical part of the benefit for which the United States bargained in the SLA. The United States agreed not to exercise its right to apply most of its own domestic trade remedy laws in return for Canada's agreement to self-regulate the production and export of softwood lumber, within the agreed-upon parameters. The Parties agreed to exchange certain information to ensure that the Agreement functions as intended. As part of that exchange, Canada is required to provide the United States information regarding exports of lumber to the United States, so that the parties can reconcile Canada's export information with the United States' import information. Canada is also required to notify the United States of any change to provincial timber pricing systems, together with an explanation, including any evidence showing how the change improves the statistical accuracy and reliability of the system, or how the change maintains or improves the extent to which the prices reflect market conditions.

B. Canada Agreed Not To Offset Or Circumvent The Export Measures

13. Canada further agreed not to offset or circumvent the Export Measures. This commitment is memorialized in Article XVII of the SLA and applies to Canada and all of its provinces, including BC.

14. The Anti-circumvention article prohibits a party from taking any “action to circumvent or offset the commitments under the SLA 2006, including any action having the effect of reducing or offsetting the Export Measures or undermining the commitments set forth in Article V.” “Grants or other benefits” that Canadian federal, provincial, or local governments provide *de jure* or *de facto* to softwood lumber producers are deemed to circumvent the Export Measures, unless they fall within certain limited exceptions. In other words, benefits that are provided on a *de jure* or *de facto* basis *per se* circumvent the Agreement, unless an exception applies.

15. The SLA’s Anti-circumvention article contains two pertinent exceptions to the general prohibition on grants or other benefits provided to producers or exporters of Canadian softwood lumber. First, the SLA provides that “measures that shall not be considered to reduce or offset the Export Measures in the SLA 2006 include without limitation”:

{P}rovincial timber pricing or forest management systems as they existed on July 1, 2006, including any modifications or updates that maintain or improve the extent to which stumpage charges reflect market conditions, including prices and costs.

This is a grandfathering provision that permits Canada and its provinces to continue to apply provincial timber pricing or forest management systems or, if Canada wishes to change the system, requires that Canada maintain or improve the extent to which stumpage fees generated under these systems reflect market conditions.

16. Second, the Agreement provides that “measures that shall not be considered to reduce or offset the Export Measures” in the SLA include:

{A}ctions or programs undertaken by a Party ... for the purpose of forest or environmental management, protection, or conservation ... provided that such actions or programs do not involve grants or other benefits that have the effect of undermining or counteracting movement toward the market pricing of timber[.]

17. Read together, the Anti-circumvention provisions contemplate that any grant or other benefit provided by BC (or any Canadian province or governmental entity) circumvents the SLA if the grant or other benefit is provided to producers or exporters of Canadian softwood lumber. There are limited exceptions to this rule, but, in general, these exceptions do not permit any grants or other benefits that are inconsistent with a movement toward the market pricing of timber, or, minimally, with maintaining the status quo.

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4. Free Trade Agreements

a. Implementation: United States-Peru Trade Promotion Agreement (“PTPA”)

In 2011, both the United States and Peru took steps to implement the PTPA. On October 28, 2011, the United States Treasury and Homeland Security Departments amended the Customs and Border Protection (“CBP”) regulations on an interim basis to implement the preferential tariff treatment and other customs-related provisions of the PTPA. 76 Fed. Reg. 68,067-84 (Nov. 3, 2011).

On June 15, 2011, Peru’s Congress passed a new forestry and wildlife law which included key reforms called for under the PTPA Annex on Forest Sector Governance to combat illegal logging and illegal trade in wildlife. The Government of Peru conducted

extensive consultations with indigenous and local communities and other stakeholders in Peru in the lead-up to passage of the forestry and wildlife law. United States Trade Representative Ron Kirk welcomed the new law and other steps taken by Peru to implement the environmental obligations under the PTPA:

The United States has worked closely with Peru over a period of two years while it developed legal provisions to strengthen forest sector governance as called for under the PTPA Annex on Forest Sector Governance. In addition to passage of the Forestry and Wildlife Law, the Government of Peru has made other unprecedented changes to its legal and regulatory regimes to implement its commitments under the Annex, including amending its Criminal Code to increase penalties for forest, wildlife and environmental crimes and assigning ecological police officers and prosecutors to regions in Peru. It also created a Ministry of Environment to take the lead on natural protected areas and to assume other important environmental duties.

Statement by Ambassador Kirk, available at www.ustr.gov/about-us/press-office/press-releases/2011/june/statement-ambassador-ron-kirk-passage-perus-forestry. The PTPA is the first U.S. trade agreement to include provisions requiring action to address a specific environmental concern and the first such agreement to subject all the environmental obligations to the same state-to-state dispute settlement procedures as commercial obligations in the agreement. See *Digest 2009* at 432-33 for discussion of the entry into force of the PTPA.

b. Free trade agreements with Panama, Colombia, and Korea

On October 21, 2011, President Obama signed legislation implementing the Panama, Colombia, and Korea free trade agreements. Pub. L. Nos. 112-43, 112-42, and 112-41. The text of the Panama trade promotion agreement (“TPA”) is available at www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text. More information about the Panama TPA is available at www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa. The final text of the Columbia FTA is available at www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text. Further information about the U.S.-Columbia agreement is available at www.ustr.gov/uscolombiatpa. The final text of the U.S.-Korea Free Trade Agreement (“KORUS FTA”) is available at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. Information about the KORUS FTA is available at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta.

USTR released a fact sheet on October 13, 2011, excerpted below, describing the next steps for these trade agreements leading up to their entry into force. The fact sheet is available at www.ustr.gov/about-us/press-office/fact-sheets/2011/october/enactment-entry-force-next-steps-trade-agreements. As of the end of 2011, United States government officials were still working with representatives of the governments of Panama, Colombia, and Korea on steps necessary for entry into force of the agreements.

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The length of time necessary to implement trade agreements varies, but the President is committed to bringing these agreements into force as soon as possible to reap their benefits at home. Here are next steps:

Action by our Trading Partners

Korea's National Assembly is now considering the U.S.-Korea trade agreement.* The legislatures of Colombia and Panama have ratified their respective agreements.

Beyond ratification, what each partner country must do to come into compliance with the agreement depends on its specific laws and regulations. Before the agreement can enter into force, each country must be able to demonstrate that it is in compliance with those obligations that will take effect on day one.

Action Here at Home

The trade agreement implementing bills contain all changes to U.S. law necessary to bring the United States into compliance with the agreements. In addition to these changes in U.S. law, for each agreement the United States will issue a proclamation containing specific tariff revisions and product-specific rules, and make additional administrative and regulatory changes covering issues such as customs and procurement.

Cooperative Work with our Trading Partners

Immediately after President Obama signs the implementing legislation, the United States will schedule cooperative work with Korea, Colombia, and Panama on implementing the agreements. The United States will hold discussions with the partner countries to review both countries' laws and regulations, and ensure compliance with the obligations of the agreement that will take effect on the day the agreement enters into force. U.S. officials will also consult with Congress and with U.S. stakeholders.

Exchange of Diplomatic Notes

The provisions of the FTAs provide for entry into force through the exchange of formal diplomatic notes at a time agreeable to both countries. In the United States, the President must first determine that the trading partner has come into compliance with obligations that will take effect when the agreement enters into force. This includes, in the case of Korea, the pertinent obligations of the 2011 exchange of letters on autos. In the case of Colombia, the Administration will also ensure that Colombia has successfully implemented key elements of the Labor Action Plan before bringing that agreement into force.

Implementation, Monitoring, and Enforcement

Following the entry into force of each agreement, work continues at the Office of the U.S. Trade Representative to ensure that each partner country remains in compliance with its immediate obligations, and comes into compliance with obligations that take effect later on. As with all U.S. trade agreements, USTR will monitor compliance and actively enforce U.S. rights under these three trade agreements going forward.

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* Editor's note: Korea's National Assembly subsequently approved the agreement in November 2011.

c. Trans-Pacific Partnership

On November 12, 2011, the leaders of the nine Trans-Pacific Partnership (“TPP”) countries—Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States—announced that they had agreed on the outlines of a trade and investment agreement. A USTR Fact Sheet, excerpted below and available at www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement, outlined the agreement’s key features, scope, and legal texts.

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Key Features

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- Comprehensive market access: to eliminate tariffs and other barriers to goods and services trade and investment, so as to create new opportunities for our workers and businesses and immediate benefits for our consumers.
- Fully regional agreement: to facilitate the development of production and supply chains among TPP members, supporting our goal of creating jobs, raising living standards, improving welfare and promoting sustainable growth in our countries.
- Cross-cutting trade issues: to build on work being done in APEC and other fora by incorporating in TPP four new, cross-cutting issues. These are:
 - Regulatory coherence. Commitments will promote trade between the countries by making trade among them more seamless and efficient.
 - Competitiveness and Business Facilitation. Commitments will enhance the domestic and regional competitiveness of each TPP country’s economy and promote economic integration and jobs in the region, including through the development of regional production and supply chains.
 - Small- and Medium-Sized Enterprises. Commitments will address concerns small- and medium-sized enterprises have raised about the difficulty in understanding and using trade agreements, encouraging small- and medium-sized enterprises to trade internationally.
 - Development. Comprehensive and robust market liberalization, improvements in trade and investment enhancing disciplines, and other commitments, including a mechanism to help all TPP countries to effectively implement the Agreement and fully realize its benefits, will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries’ respective economic development priorities.
- New trade challenges: to promote trade and investment in innovative products and services, including related to the digital economy and green technologies, and to ensure a competitive business environment across the TPP region.

- Living agreement: to enable the updating of the agreement as appropriate to address trade issues that emerge in the future as well as new issues that arise with the expansion of the agreement to include new countries.

Scope

- The agreement is being negotiated as a single undertaking that covers all key trade and trade-related areas. In addition to updating traditional approaches to issues covered by previous free trade agreements (FTAs), the TPP includes new and emerging trade issues and cross-cutting issues.
- More than twenty negotiating groups have met over nine rounds to develop the legal texts of the agreement and the specific market access commitments the TPP countries will make to open their markets to each others' goods, services, and government procurement.
- All of the nine countries also have agreed to adopt high standards in order to ensure that the benefits and obligations of the agreement are fully shared. They also have agreed on the need to appropriately address sensitivities and the unique challenges faced by developing country members, including through trade capacity building, technical assistance, and staging of commitments as appropriate.
- A set of new, cross-cutting commitments are intended to reduce costs, enable the development of a more seamless trade flows and trade networks between TPP members, encourage the participation of small- and medium-sized enterprises in international trade, and promote economic growth and higher living standards.
- The negotiating teams have proposed new commitments on cross-cutting issues in traditional chapters and also have made substantial progress toward agreement on separate, stand-alone commitments to address these issues.

Legal Texts

- The negotiating groups have developed consolidated legal text in virtually all negotiating groups. In some areas, text is almost complete; in others, further work is needed to finalize text on specific issues. The texts contain brackets to indicate where differences remain.
 - The legal texts will cover all aspects of commercial relations among the TPP countries.
- The following are the issues under negotiation and a summary of progress.

- **Competition.** The competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies. Negotiators have made significant progress on the text, which includes commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation.
- **Cooperation and Capacity Building.** The TPP countries agree that capacity building and other forms of cooperation are critical both during the negotiations and post-conclusion to support TPP countries' ability to implement and take advantage of the agreement. They recognize that capacity building activities can be an effective tool in helping to address specific needs of developing countries in meeting the high standards the TPP countries have agreed to seek. In this spirit, several cooperation and capacity building activities have already been implemented in response to specific requests and additional activities are being planned to assist developing countries in achieving the objectives of the agreement. The TPP countries also are discussing specific text that will establish a demand-driven and flexible institutional

mechanism to effectively facilitate cooperation and capacity building assistance after the TPP is implemented.

- Cross-Border Services. TPP countries have agreed on most of the core elements of the cross-border services text. This consensus provides the basis for securing fair, open, and transparent markets for services trade, including services supplied electronically and by small- and medium-sized enterprises, while preserving the right of governments to regulate in the public interest.
- Customs. TPP negotiators have reached agreement on key elements of the customs text as well as on the fundamental importance of establishing customs procedures that are predictable, transparent and that expedite and facilitate trade, which will help link TPP firms into regional production and supply chains. The text will ensure that goods are released from customs control as quickly as possible, while preserving the ability of customs authorities to strictly enforce customs laws and regulations. TPP countries also have agreed on the importance of close cooperation between authorities to ensure the effective implementation and operation of the agreement as well as other customs matters.
- E-Commerce. The e-commerce text will enhance the viability of the digital economy by ensuring that impediments to both consumer and businesses embracing this medium of trade are addressed. Negotiators have made encouraging progress, including on provisions addressing customs duties in the digital environment, authentication of electronic transactions, and consumer protection. Additional proposals on information flows and treatment of digital products are under discussion.
- Environment. A meaningful outcome on environment will ensure that the agreement appropriately addresses important trade and environment challenges and enhances the mutual supportiveness of trade and environment. The TPP countries share the view that the environment text should include effective provisions on trade-related issues that would help to reinforce environmental protection and are discussing an effective institutional arrangement to oversee implementation and a specific cooperation framework for addressing capacity building needs. They also are discussing proposals on new issues, such as marine fisheries and other conservation issues, biodiversity, invasive alien species, climate change, and environmental goods and services.
- Financial Services. The text related to investment in financial institutions and cross-border trade in financial services will improve transparency, non-discrimination, fair treatment of new financial services, and investment protections and an effective dispute settlement remedy for those protections. These commitments will create market-opening opportunities, benefit businesses and consumers of financial products, and at the same time protect the right of financial regulators to take action to ensure the integrity and stability of financial markets, including in the event of a financial crisis.
- Government Procurement. The text of the Government Procurement Chapter will ensure that procurement covered under the chapter is conducted in a fair, transparent, and non-discriminatory manner. The TPP negotiators have agreed on the basic principles and procedures for conducting procurement under the chapter, and are developing the specific obligations. The TPP partners are seeking comparable coverage of procurement by all the countries, while recognizing the need to facilitate

the opening of the procurement markets of developing countries through the use of transitional measures.

- Intellectual Property. TPP countries have agreed to reinforce and develop existing World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.
- Investment. The investment text will provide substantive legal protections for investors and investments of each TPP country in the other TPP countries, including ongoing negotiations on provisions to ensure non-discrimination, a minimum standard of treatment, rules on expropriation, and prohibitions on specified performance requirements that distort trade and investment. The investment text will include provisions for expeditious, fair, and transparent investor-State dispute settlement subject to appropriate safeguards, with discussions continuing on scope and coverage. The investment text will protect the rights of the TPP countries to regulate in the public interest.
- Labor. TPP countries are discussing elements for a labor chapter that include commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern. They agree on the importance of coordination to address the challenges of the 21st-century workforce through bilateral and regional cooperation on workplace practices to enhance workers' well-being and employability, and to promote human capital development and high-performance workplaces.
- Legal Issues. TPP countries have made substantial progress on provisions concerning the administration of the agreement, including clear and effective rules for resolving disputes and are discussing some of the specific issues relating to the process. TPP countries also have made progress on exceptions from agreement obligations and on disciplines addressing transparency in the development of laws, regulations, and other rules. In addition, they are discussing proposals related to good governance and to procedural fairness issues in specific areas.
- Market Access for Goods. The TPP countries have agreed to establish principles and obligations related to trade in goods for all TPP countries that ensure that the market access that they provide to each other is ambitious, balanced, and transparent. The text on trade in goods addresses tariff elimination among the partners, including significant commitments beyond the partners' current WTO obligations, as well as elimination of non-tariff measures that can serve as trade barriers. The TPP partners are considering proposals related to import and export licensing and remanufactured goods. Additional provisions related to agricultural export competition and food security also are under discussion.
- Rules of Origin. TPP countries have agreed to seek a common set of rules of origin to determine whether a product originates in the TPP region. They also have agreed that

- TPP rules of origin will be objective, transparent and predictable and are discussing approaches regarding the ability to cumulate or use materials from within the free trade area in order to make a claim that a product is originating. In addition, the TPP countries are discussing the proposals for a system for verification of preference claims that is simple, efficient and effective.
- Sanitary and Phytosanitary Standards (SPS). To enhance animal and plant health and food safety and facilitate trade among the TPP countries, the nine countries have agreed to reinforce and build upon existing rights and obligations under the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures. The SPS text will contain a series of new commitments on science, transparency, regionalization, cooperation, and equivalence. In addition, negotiators have agreed to consider a series of new bilateral and multilateral cooperative proposals, including import checks and verification.
 - Technical Barriers to Trade (TBT). The TBT text will reinforce and build upon existing rights and obligations under the World Trade Organization Agreement on Technical Barriers, which will facilitate trade among the TPP countries and help our regulators protect health, safety, and the environment and achieve other legitimate policy objectives. The text will include commitments on compliance periods, conformity assessment procedures, international standards, institutional mechanisms, and transparency. The TPP countries also are discussing disciplines on conformity assessment procedures, regulatory cooperation, trade facilitation, transparency, and other issues, as well as proposals that have been tabled covering specific sectors.
 - Telecommunications. The telecommunications text will promote competitive access for telecommunications providers in TPP markets, which will benefit consumers and help businesses in TPP markets become more competitive. In addition to broad agreement on the need for reasonable network access for suppliers through interconnection and access to physical facilities, TPP countries are close to consensus on a broad range of provisions enhancing the transparency of the regulatory process, and ensuring rights of appeal of decisions. Additional proposals have been put forward on choice of technology and addressing the high cost of international mobile roaming.
 - Temporary Entry. TPP countries have substantially concluded the general provisions of the chapter, which are designed to promote transparency and efficiency in the processing of applications for temporary entry, and ongoing technical cooperation between TPP authorities. Specific obligations related to individual categories of business person are under discussion.
 - Textiles and Apparel. In addition to market access on textiles and apparel, the TPP countries also are discussing a series of related disciplines, such as customs cooperation and enforcement procedures, rules of origin and a special safeguard.
 - Trade Remedies. TPP countries have agreed to affirm their WTO rights and obligations and are considering new proposals, including obligations that would build upon these existing rights and obligations in the areas of transparency and procedural due process. Proposals also have been put forward relating to a transitional regional safeguard mechanism.

President Obama delivered remarks at the meeting of the leaders of the nine TPP countries in Hawaii on November 12, 2011. His remarks are excerpted below. Daily Comp. Pres. Docs. 2011 DCPD No. 00854, p. 1.

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I want to welcome, once again, all the leaders gathered around this table and their trade ministers to Hawaii. Here in Hawaii, the United States wants to send a clear message: We are a Pacific nation, and we are deeply committed to shaping the future security and prosperity of the Trans-Pacific region, the fastest growing region in the world.

I'm very pleased to be here with my partners with whom we're pursuing a very ambitious new trade agreement, the Trans-Pacific Partnership. I want to thank my fellow leaders from Australia, New Zealand, Malaysia, Brunei, Singapore, Vietnam, Chile, and Peru.

We just had an excellent meeting, and I'm very pleased to announce that our nine nations have reached the broad outlines of an agreement. There are still plenty of details to work out, but we are confident that we can do so. So we've directed our teams to finalize this agreement in the coming year. It is an ambitious goal, but we are optimistic that we can get it done.

The TPP will boost our economies, lowering barriers to trade and investment, increasing exports, and creating more jobs for our people, which is my number-one priority. Along with our trade agreements with South Korea, Panama, and Colombia, the TPP will also help achieve my goal of doubling U.S. exports, which support millions of American jobs.

Taken together, these eight economies would be America's fifth largest trading partner. We already do more than \$200 billion in trade with them every single year, and with nearly 500 million consumers between us, there's so much more that we can do together.

In a larger sense, the TPP has the potential to be a model not only for the Asia-Pacific, but for future trade agreements. It addresses a whole range of issues not covered by past agreements, including market regulations and how we can make them more compatible, creating opportunities for small and medium-sized businesses in the growing global marketplace. It will include high standards to protect workers' rights and the environment.

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5. Bilateral Investment Treaty with Rwanda

On September 26, 2011, the U.S. Senate approved the U.S.-Rwanda Bilateral Investment Treaty ("BIT") by unanimous consent. 157 Cong. Rec. S6004 (2011). The State Department's September 27, 2011 media note applauding the Senate's approval of the treaty is available at www.state.gov/r/pa/prs/ps/2011/09/174101.htm. On December 2, 2011, the two sides exchanged instruments of ratification. The BIT entered into force 30 days later, on January 1, 2012. The text of the BIT and its annexes is available at www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents. See *Digest 2008* for background on the signing of the U.S.-Rwanda BIT and excerpts from the transmittal package submitted to the Senate for advice and consent.

E. ANTITRUST

On March 31, 2011, the United States Department of Justice and the United States Federal Trade Commission entered into an agreement on antitrust cooperation with the Fiscalía Nacional Económica (“FNE”) of Chile. Cooperating in the area of competition policy was one of the commitments made under the U.S.-Chile Free Trade Agreement, signed in 2003. The antitrust agreement is available at

www.justice.gov/atr/public/international/docs/269195.htm.

On July 27, 2011, the United States Department of Justice and the United States Federal Trade Commission entered into a Memorandum of Understanding on Antitrust and Antimonopoly Cooperation with relevant agencies in the government of the People’s Republic of China. The MOU is available at www.ftc.gov/os/2011/07/110726mou-english.pdf.

F. OTHER ISSUES

1. Intellectual Property: Special 301 Report

On May 2, 2011, the Office of the U.S. Trade Representative (“USTR”) announced the issuance of the 2010 Special 301 Report (“Report”) to identify those foreign countries that deny adequate and effective protection of intellectual property rights (“IPR”) or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection. USTR submits the Report annually pursuant to § 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2011 Report reviewed 77 trading partners’ protection and enforcement of IPR and identified 12 countries on the Priority Watch List, 29 on the Watch List, and one country under § 306 monitoring. Countries listed in these categories are found lacking with respect to IPR protection, enforcement, or market access for persons relying on intellectual property protection. See *Digest 2007* at 605–7 for additional background.

The 2011 Report included an invitation to all trading partners listed in the Report to cooperatively develop action plans to resolve IPR issues of concern. In the past, successful completion of action plans has led to trading partners’ removal from the Special 301 lists. The Report identified particular problems in the listed countries, such as: Canada’s failure in 2010 to enact long-awaited copyright legislation and to strengthen border enforcement; the prevalence of piracy and counterfeiting in China, and China’s implementation of “indigenous innovation” and other industrial policies that discriminate against or otherwise disadvantage U.S. exports and U.S. investors; ongoing problems involving piracy over the internet, and a need for better enforcement of IPR laws in Russia. The Report also recognized positive accomplishments in a number of areas. These accomplishments included the enactment of significant IPR legislation in Mexico, the Philippines, Russia, and Spain. However, no countries were removed from the watch lists. The full text of the Report is available at www.ustr.gov/webfm_send/2841. For a list of the countries identified in the

2011 Report, see USTR's press release of May 2, 2011, available at www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-releases-annual-special-301-report-intellectual-p.

Separately, on February 28, 2011 USTR issued the conclusions of a Special 301 Out-of-Cycle Review of Notorious Markets, available at www.ustr.gov/webfm_send/2595. The notorious market list had previously been included in the annual Special 301 Report. However, USTR concluded that it could further expose the notorious markets list by initiating a separate, dedicated request for comments, and by publishing the list separately from the Special 301 Report. The results of the review identified concerns with more than 30 Internet and physical markets that present key challenges in the struggle against piracy and counterfeiting. For further information on the Notorious Markets list, see USTR's press release of February 28, 2011 available at www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-announces-results-special-301-review-notorio.

2. OECD Guidelines for Multinational Enterprises: Due Diligence Regarding Conflict Minerals

On May 25, 2011 the Organization for Economic Cooperation and Development ("OECD") adopted new updates to the Guidelines for Multinational Enterprises. Representatives of OECD members, including Secretary of State Hillary Rodham Clinton, adopted the updated guidelines during the OECD's 50th Anniversary Commemoration. Secretary Clinton described the significance of the guidelines as a whole and the updates related to corporate social responsibility in a speech, set forth below and available at www.state.gov/secretary/rm/2011/05/164340.htm. See *Digest 2002* for a discussion of U.S. adherence to the OECD guidelines—in particular by establishing a national contact point. The guidelines are non-binding recommendations for appropriate corporate behavior made to multinational enterprises by OECD members and non-member countries. The updated guidelines are available at www.state.gov/documents/organization/140824.pdf.

* * * *

Next, we turn to the OECD New Guidelines for Multinational Enterprises. For over 35 years, these guidelines have occupied a unique space within the world of corporate social responsibility. They are the only ones formally endorsed by governments, 42 at last count. And they do bring together labor, civil society, and business to create the broadest possible consensus behind them. This is truly the work of a global policy network in action.

This year's updated guidelines include an important new chapter on human rights, drawing on the work of UN Special Representative John Ruggie. These guidelines help companies ensure their dealings with third parties do not cause or contribute to human rights violations.

And let me now invite those who will be formalizing this very important step forward, because after all, if you look at these guidelines, they will be helping us determine how supply

chains can be changed so that it can begin to prevent and eliminate abuses and violence. We're going to look at new strategies that will seek to make our case to companies that due diligence, while not always easy, [is] absolutely essential. ...

And I was particularly pleased to see a recommendation that businesses act as partners in promoting a free and open internet. We've seen the results of what happens when we see repression being exercised on the internet, so this is a very big step forward.

The countries adhering to the Declaration on International Investment and Multinational Enterprises are all OECD members, plus Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania, adopting the amended Guidelines for Multinational Enterprises.

The OECD Council now adopts the amended decision on the OECD Guidelines for Multinational Enterprises. And here I note that Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania adhere to this decision.

Next, moving to the adoption of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the OECD Council adopts the recommendation, and I note that Argentina, Brazil, Latvia, Lithuania, Morocco, Peru, and Romania adhere to this recommendation. And Brazil has made a statement which will be included in the summary record and in the final text of the recommendation.

Each of these agreements reflects a great deal of consensus-building and hard work, and I think we should be especially grateful to those who are standing here on the stage. I think we all look forward to working closely with you and others committed to raising standards for corporate social responsibility, just as we have done today.

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On July 15, 2011, the State Department issued a statement specifically endorsing and encouraging companies to follow the new "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas." The statement is available at www.state.gov/e/eb/diamonds/docs/168632.htm. The statement explained that promoting acceptance of the OECD guidance runs parallel with requirements under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Section 1502 directs the Securities and Exchange Commission ("SEC"), in consultation with the State Department, to promulgate regulations requiring companies reporting to the SEC to disclose each year whether conflict minerals (gold, columbite-tantalite (coltan), cassiterite (tin), wolframite (tungsten)), used in any of their products originated in the Democratic Republic of the Congo (DRC) or an adjoining country, and if so, to disclose the measures taken to exercise due diligence on the source and chain of custody of the minerals. Excerpts of the statement, signed by Under Secretary of State for Economic, Energy, and Agricultural Affairs, Robert D. Hormats and Under Secretary of State for Democracy and Global Affairs, María Otero, follow.

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The Department holds that it is critical that companies begin now to perform meaningful due diligence with respect to conflict minerals. To this end, companies should begin immediately to

structure their supply chain relationships in a responsible and productive manner to encourage legitimate, conflict-free trade. Doing so will facilitate useful disclosures under Section 1502, as well as effective responses to any discovery of benefit to armed groups.

The Department specifically endorses the guidance issued by the Organization for Economic Cooperation and Development (OECD) and encourages companies to draw upon this guidance as they establish their due diligence practices.¹ We encourage companies, whether or not they are subject to the Section 1502 disclosure requirement, that are within the supply chain of these minerals to exercise due diligence based on the OECD guidance and framework as a means of responding to requests from subject suppliers and customers.

The five-step framework at the core of this system has been developed in a broadly consultative, multi-stakeholder process and has been recommended by the United Nations Security Council DRC Sanctions Committee's Group of Experts (UNGOE), "taken forward" by the Security Council itself, and endorsed by the International Conference on the Great Lakes Region. Under this five-step framework, companies should:

1. Establish strong company management systems;
2. Identify and assess risk in the supply chain;
3. Design and implement a strategy to respond to identified risks;
4. Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; and
5. Report on supply chain due diligence.

This framework has particular significance in light of its development by an inclusive and international multi-stakeholder process, its regional endorsement by the International Conference of the Great Lakes Region, and the decision of the UN Security Council to consider, when it is determining whether to designate for targeted sanctions an individual or entity supporting the armed groups that foster conflict and human rights abuses in the eastern part of the DRC through illicit trade of natural resources, whether an individual or entity has exercised due diligence consistent with these steps. Consistent with the five-step framework, a company may rely on the documented representations of suppliers further "upstream," provided that the company has taken the appropriate internal and independent auditing measures and due diligence steps set forth in the five-step framework. Furthermore, we note that, according to the OECD guidance, companies "may coordinate efforts through industry-wide initiatives to...overcome practical challenges and effectively discharge the due diligence recommendations contained in this Guidance."

We recognize implementation of this framework will take time, and will present challenges as many of the mechanisms needed to facilitate transparency for in-region sourcing are developed. We also acknowledge that these due diligence frameworks will likely continue to evolve and develop, particularly as both the OECD and UNGOE are engaged in processes to evaluate implementation. Nonetheless, we urge governments to take steps to support these frameworks and companies to begin to exercise due diligence immediately in order to ensure a viable and conflict-free supply chain of minerals from the region. To facilitate this process, we will continue to hold consultations on the way forward with interested stakeholders in order to

¹ "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas," adopted as a Recommendation by the OECD Council on May 25, 2011, under the chairmanship of Secretary of State Hillary Clinton and available at www.oecd.org/dataoecd/62/30/46740847.pdf.

produce collective answers to the many outstanding issues.

Finally, the Department wishes to make clear that the intention of this guidance is to facilitate and promote improved governance, peace and stability, respect for human rights, economic development, and improved livelihoods in the DRC and Great Lakes region. We thank the private sector for its partnership in implementing this critical tool to end the trade in conflict minerals, and we thank civil society for its partnership in supporting greater peace and prosperity in the DRC.

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Cross References

Counternarcotics majors list, **Chapter 3.B.2.a.**

Anti-Counterfeiting Trade Agreement, **Chapter 4.A.2.**

Statute implementing Berne (Copyright) Convention (Golan v. Holder), **Chapter 4.B.2.**

Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**

Act of State and Political Question doctrines, **Chapter 5.C.**

Guiding principles on business and human rights, **Chapter 6.A.3.c.**

Work of the ILC on “fair and equitable treatment” standard, **Chapter 7.C.**

Immunity from attachment of multinational research satellite, **Chapter 10.A.2.a.(1)**

Commercial private international law, **Chapter 15.A.**

International civil litigation in U.S. courts, **Chapter 15.B.**

Sanctions, **Chapter 16.**

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

On December 16, 2011, U.S. Secretary of State Hillary Rodham Clinton delivered remarks at the Pew Business Roundtable on the Law of the Sea Convention. Her statement, repeating the executive branch's support for U.S. accession to the UN Convention on the Law of the Sea, appears below and is also available at www.state.gov/secretary/rm/2011/12/178603.htm.

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I am delighted to have this opportunity to speak to this roundtable and once again voice my support for joining the Law of the Sea Convention. Signing onto the Convention is critical to protecting American security and enhancing our economic strength.

Joining the Convention would put America's resource rights on firm legal footing, protecting American business interests and helping those businesses stay competitive internationally. The Convention provides legal certainty and predictability that businesses can rely on, empowering them to pursue ventures that they would not be able to undertake otherwise.

For example, Chinese, Indian, and Russian companies are exploring deep seabeds for rare earth elements and valuable metals, but the United States cannot sponsor our companies to do the same. Joining the Convention will level the playing field for American companies so they have the same rights and opportunities as their competitors.

Past administrations—both Republican and Democratic—the United States military, and industry and environmental groups have all together signaled strong support for joining the Convention. It is a key piece of unfinished business. And I'm confident that the United States will soon do what over 160 other countries have already done and join the Law of the Sea Convention. Thanks to all of you for helping to make this a reality.

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2. Other Boundary or Territorial Issues

On July 22, 2011, after the ASEAN Regional Forum, the State Department issued a press statement by Secretary Clinton explaining the U.S. position on territorial and maritime disputes in the South China Sea. The July 22 statement is excerpted below. The full text of the press statement is available at www.state.gov/secretary/rm/2011/07/168989.htm.

Secretary Clinton provided similar explanations of the U.S. position on the South China Sea on other occasions in 2011. Her June 2, 2011 remarks after a meeting with Foreign Secretary Albert del Rosario of the Philippines are available at www.state.gov/secretary/rm/2011/06/166868.htm. Secretary Clinton's remarks on November 16, 2011 also included some discussion of the South China Sea and are available at www.state.gov/secretary/rm/2011/11/177234.htm. See *Digest 2010* at 513-14 for Secretary Clinton's remarks in 2010 on the South China Sea disputes.

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The United States supports a collaborative diplomatic process by all claimants for resolving the various disputes in the South China Sea. We also support the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. But we do not take a position on the competing territorial claims over land features in the South China Sea. We believe all parties should pursue their territorial claims and accompanying rights to maritime space in accordance with international law, including as reflected in the 1982 Law of the Sea Convention.

The United States is concerned that recent incidents in the South China Sea threaten the peace and stability on which the remarkable progress of the Asia-Pacific region has been built. These incidents endanger the safety of life at sea, escalate tensions, undermine freedom of navigation, and pose risks to lawful unimpeded commerce and economic development.

...[E]ach of the parties should comply with their commitments to respect freedom of navigation and over-flight in the South China Sea in accordance with international law, to resolve their disputes through peaceful means, without resorting to the threat or use of force. They should exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from taking action to inhabit presently uninhabited islands, reefs, shoals, cays, and other features, and to handle their differences in a constructive manner.

The United States encourages all parties to accelerate efforts to reach a full Code of Conduct in the South China Sea.

We also call on all parties to clarify their claims in the South China Sea in terms consistent with customary international law, including as reflected in the Law of the Sea Convention. Consistent with international law, claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.

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3. Piracy

For discussion of U.S. piracy prosecutions in 2011, see Chapter 3.B.8.

4. Freedoms of Navigation and Overflight

a. *Excessive air space claim—Venezuela*

In January 2011, the United States conveyed, through its embassy in Caracas, its protest of three incidents of Venezuela improperly denying access for U.S. military aircraft to a flight information region ("FIR") under Venezuelan administration. Venezuela had similarly improperly denied access for U.S. military aircraft to the Maiquetia FIR in 2007. See *Digest 2007* at 634-36. Excerpts follow from an unclassified telegram advising the U.S. embassy in Caracas on the legal basis for, and measures needed to register, the U.S. protest.

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2. There have been three recent incidents in which U.S. military aircraft were inappropriately denied access to the Maiquetia Flight Information Region (FIR). In all three cases, the aircraft were on transit on a planned route that would take them through the FIR administered by Venezuela. Maiquetia Air Traffic Control (ATC) informed that they would not allow transit through their airspace. Under customary international law, Venezuela does not have the right to exclude such aircraft from areas beyond the Venezuelan territorial airspace. ...

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Legal Basis for USG Position

5. This is not the first time Venezuelan ATC authorities have required overflight clearance for U.S. military aircraft to transit the MAIQUETIA FIR. The U.S. Government has previously demarched the Government of Venezuela regarding similar excessive airspace claims....

6. Customary international law, as reflected in the 1982 United Nations Convention on the Law of the Sea authorizes a State to claim a twelve (12) NM territorial sea and corresponding airspace, measured from baselines drawn consistent with international law. Beyond the territorial sea, all aircraft, including military and other state aircraft, enjoy the freedoms of navigation and overflight. Military and other state aircraft operating in airspace beyond territorial airspace (whether within or outside a FIR) are free to operate without the consent of, or notice to, coastal State authorities, and are not subject to the jurisdiction of ATC authorities of those States. A coastal State may establish a FIR encompassing airspace that extends beyond territorial airspace, consistent with the requirements of the 1944 Convention on International Civil Aviation (Chicago Convention), to which Venezuela is a party. However, FIR rules apply only to civil, but not state aircraft. Military aircraft such as [those involved in the three recent incidents] are a type of state aircraft.

7. The actions of Venezuelan air traffic control authorities at MAIQUETIA ATC were contrary to customary international law in that MAIQUETIA ATC asserted the right to exclude [the three U.S. military aircraft involved] (a right only enjoyed regarding territorial airspace) from an area of the MAIQUETIA FIR over which Venezuela does not have sovereignty. Therefore, a diplomatic response is warranted to explain our position and request that Venezuela

not again take such actions. In addition, the United States retains the right to respond under the U.S. Freedom of Navigation Program, which has been in place since 1979. The purpose of the FON program is to preserve global maritime mobility of the U.S. armed forces by avoiding acquiescence in excessive claims by other nations to the world's oceans and airspace. The United States acts assertively when coastal States make claims inconsistent with international law, which, if unchallenged, could limit navigational and overflight freedoms vital to U.S. security. The United States considers that the 1982 Law of the Sea Convention accurately reflects the customary rules of international law concerning maritime navigation and overflight rights and freedoms.

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b. Excessive maritime claim—Argentina

On May 20, 2011, the U.S. Embassy in Argentina received a diplomatic note from the Ministry of Foreign Affairs, International Trade, and Worship of the Argentine Republic concerning the transit by two U.S. frigates through the Strait of Magellan on that same day. The government of Argentina conveyed its view that its regulations require three weeks advance notice for innocent passage of foreign warships in Argentine territorial waters. The U.S. Embassy responded by diplomatic note on July 22, 2011, asserting that no prior notice is required under international law. Excerpts from the U.S. diplomatic note follow.

* * * *

...[T]he United States takes this opportunity to reiterate its longstanding view that customary international law, as reflected in the UN Law of the Sea Convention, does not authorize a coastal state to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal state. As a matter of longstanding policy and practice the United States does not provide prior notification for U.S. flag vessels, including warships, exercising the right of innocent passage in a territorial sea.

The policy is likewise maintained with respect to the right of transit passage through straits used for international navigation and when exercising high seas freedoms of navigation and overflight within an exclusive economic zone.

With respect to the navigational regime for the Strait of Magellan, the United States appreciates the view of the Government of Argentina that this matter is regulated by the Boundary Treaty between Argentina and Chile of 1881 and the Peace and Friendship Treaty of 1984 between the same countries. In this regard, the United States understands that this regime is recognized by customary international law, as reflected in Article 35(c) of the Law of the Sea Convention, and that this regime provides for free navigation, including the right of overflight, to be exercised without any requirement of prior notification.

The United States also notes that during a May 19, 2011 meeting between the U.S. Military Group Navy Section Chief and the Argentine Navy's Plans and Political directorate head Rear Admiral Romero, the U.S. side informed Admiral Romero of the frigates' passage

through the Strait of Magellan. This and past instances of officials of the U.S. Embassy informing Argentine authorities of the passage of certain U.S. naval vessels were provided in connection with visits to an Argentine port or activities with the Argentine naval forces.

The United States values its relationship with Argentina. The United States maintains the aforementioned policy with regard to freedom of navigation and overflight in our relations with all countries, including our close friends and partners. This policy does not, of course, affect notifications made for port visits or cooperative activities between our military forces.

* * * *

c. *Excessive maritime claim—Ecuador*

On October 29, 2011, the United States Coast Guard conducted a boarding of a Costa Rican-flagged fishing vessel suspected of illicit narcotics trafficking in waters of the eastern Pacific. On November 28, 2011, the Ministry of Foreign Affairs, Commerce and Integration of the Republic of Ecuador sent a note verbale to the U.S. Embassy in Ecuador claiming that boarding the vessel violated international law because it was done within Ecuador's claimed 200 nautical mile territorial sea without prior consent from the government of Ecuador. The United States responded by diplomatic note dated December 9, 2011, stressing that its actions were consistent with customary international law as reflected in the UN Convention on the Law of the Sea. The substantive paragraphs of the U.S. response appear below.

* * * *

The vessel in question was suspected of engaging in illicit narcotics trafficking and was boarded by the U.S. Coast Guard with the authorization of the flag State, Costa Rica. The boarding of the vessel was undertaken approximately 100 nautical miles north of the Galapagos Islands in the claimed territorial sea of Ecuador.

The United States fully recognizes that the sovereignty of a State extends beyond its land territory and internal waters to its adjacent territorial sea. However, under customary international law as reflected in the United Nations Convention on the Law of the Sea ("the Convention"), a State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. In areas beyond the 12 nautical mile territorial sea, all States enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms, consistent with international law as reflected in the Convention.

In this regard, the United States takes this opportunity to reiterate its longstanding protest of the 200 nautical mile territorial sea claim of the Government of Ecuador. This objection has been communicated to the Government of Ecuador on several occasions since 1967. Since that time, the United States has exercised its freedoms of navigation and overflight in those areas of claimed territorial sea that exceed the limits permitted by international law.

The United States has reviewed the position of the Coast Guard vessel in question and concluded that, at the relevant times, the vessel was located beyond 12 nautical miles from

Ecuadorian land territory. As stated above, the United States does not recognize Ecuador's territorial sea claim because it exceeds the limits permitted by international law.

* * * *

d. Thailand's Declarations on ratification of the UN Convention on the Law of the Sea

On May 15, 2011, the Kingdom of Thailand deposited with the United Nations its instrument of ratification of the UN Convention on the Law of the Sea. Thailand's instrument of ratification included five declarations relating to Article 310 of the Convention, one of which asserting that the enjoyment of freedom of navigation in the exclusive economic zone ("EEZ") excluded non-peaceful use, in particular, military exercises, without consent. The United States delivered a diplomatic note to the ministry of foreign affairs of Thailand on October 6, 2011 protesting the assertion in this declaration. The substantive paragraphs of the diplomatic note are set forth below.

* * * *

The United States wishes to recall that, although the United States is not yet a party to the Convention, it has long regarded the Convention as reflecting customary international law with respect to traditional uses of the ocean. Since President Ronald Reagan's 1983 Statement on United States Oceans Policy, the United States has acted in accordance with the 1982 Convention's balance of interests, including with respect to its exercise of navigation and overflight rights on a worldwide basis.

The United States also wishes to recall that, while Article 310 of the Convention allows States to make declarations at the time of signing, ratifying or acceding to the Convention, Article 310 also provides that such declarations may not purport to exclude or modify the legal effect of the provisions of the Convention in their application to the State making the declaration.

The United States disagrees with the fourth paragraph of Thailand's declaration stating that the provisions of the Convention exclude military activities in the exclusive economic zone (EEZ) without the consent of the coastal State.

The United States wishes to recall that, within the exclusive economic zone, a coastal State has sovereign rights for the purpose of exploring, exploiting, conserving and managing the living and non-living natural resources of the water column and the sea-bed and its subsoil. The coastal State also has jurisdiction with regard to the protection and preservation of the marine environment, marine scientific research, and the establishment and use of artificial islands, installations and structures for economic purposes.

The United States also wishes to recall that pursuant to Article 56 of the Convention, a coastal State's rights and jurisdiction within its exclusive economic zone are subject to the rights and duties of other states as provided for in international law. Pursuant to Article 58, the rights specifically preserved for ships and aircrafts of all States in the exclusive economic zone include the freedom of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms, without requirement to provide prior notification to or obtain prior permission from the coastal State. These include military exercises and maneuvers involving the use of weapons and explosives.

The United States cannot accept the view that “military exercises or other activities [in the EEZ] which may affect the rights or interests of the coastal State” constitute “non-peaceful” uses of the seas. In this regard, the United States notes that while the Convention provides for the peaceful uses of the seas in Article 301, this provision is interpreted in line with Article 2.4 of the U.N. Charter; it does not authorize a coastal state to require prior notification of or its consent to military activities in its EEZ. With regard to the “interests” of the coastal state, the Convention does not recognize a security interest of the coastal State within the EEZ that would provide authority to regulate military activities of other States.

As reflected in the Convention, including the provisions referred to above, the United States considers that all States have the right to conduct military activities within the EEZ, subject to an obligation to have due regard to coastal State resource and other rights as well as the rights of other States as set forth in the Convention. It is the duty of the flag State, not the right of the coastal State, to enforce this due regard obligation.

Accordingly, the United States reserves its rights with regard to the matters addressed in the aforementioned declaration.

* * * *

5. Maritime Security and Law Enforcement

a. Agreement with Senegal

On April 29, 2011, the U.S. ambassador to Senegal and the minister of foreign affairs for the government of the Republic of Senegal signed an agreement “Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity.” The agreement entered into force upon signature. As provided for in Article 2 of the agreement, its purpose is to “strengthen ongoing cooperative maritime surveillance and interdiction activities between the parties, for the purposes of identifying, combating, preventing, and interdicting illicit transnational maritime activity.” The agreement contains shiprider provisions, allowing officers of Senegal’s defense and security forces, fisheries inspectors, and other authorized agents of Senegal to embark on U.S. Coast Guard or Navy vessels or aircraft to conduct joint operations. These vessels or aircraft carrying “embarked officers” may be authorized on a case-by-case basis to enter the territorial sea of the Republic of Senegal to assist in stopping, boarding, and searching vessels suspected of violating Senegal’s laws and in arresting suspects and seizing contraband and vessels. The agreement also permits U.S. Coast Guard or Navy vessels and aircraft, with embarked officers, to assist in fisheries surveillance and law enforcement activities in Senegal’s exclusive economic zone. The agreement further empowers Senegal’s embarked officers to permit the U.S. Coast Guard or Navy vessels to stop, board, and search vessels located seaward of any state’s territorial sea and claiming registry or nationality in the Republic of Senegal. The full text of the agreement is available at www.state.gov/documents/organization/169471.pdf.

b. Agreements with Nauru and Tuvalu

On September 8 and 9, 2011, the United States concluded virtually identical agreements with the Republic of Nauru and Tuvalu, respectively, concerning cooperation to suppress illicit transnational maritime activity. Article 2 of the agreements set forth the purpose of the agreements in a manner identical to that of the Senegal agreement referenced above. The agreements with Nauru and Tuvalu also include shiprider provisions similar to the provisions in the agreement with Senegal. In addition, the agreements with Nauru and Tuvalu authorize U.S. law enforcement officials operating even without any embarked officials from the other Party to board and search suspect vessels and persons on board if the vessels claim registry or nationality in the other Party and are located seaward of any nation's territorial sea. The full text of the agreement with Nauru is available at www.state.gov/documents/organization/180539.pdf and the full text of the agreement with Tuvalu is available at www.state.gov/documents/organization/180540.pdf.

c. Agreement with Gambia

On October 10, 2011, the United States and the Republic of Gambia concluded an agreement concerning cooperation to suppress illicit transnational maritime activity. Article 2 of the agreement provides that:

The object of this Agreement is to promote cooperation between the Parties for the purpose of enabling them to more effectively suppress, combat and respond to illicit transnational maritime activity, including without limitation trafficking in narcotic drugs and psychotropic substances.

The agreement contains shiprider provisions to permit members of the "security forces" of one Party to embark on the ships or aircraft of the other Party to conduct joint maritime law enforcement operations. "Security forces" is defined to mean the Coast Guard for the United States and the Armed and Security Forces of The Gambia, including Naval components, Department of Fisheries, National Drug Enforcement Agency, and other departments and agencies. The agreement also authorizes the Coast Guard, under certain conditions, to investigate, board, and search suspect vessels in Gambia's waters if no Gambian official is on the Coast Guard ship. In such circumstances, the agreement authorizes the Coast Guard to detain the vessel, cargo, and persons on board if evidence of illicit transnational maritime activity is found pending instructions from the Republic of The Gambia Security Force.

The agreement is also a shipboarding agreement. It authorizes the security forces of each Party, under certain circumstances, to board, search, and detain suspect vessels in international waters that claim nationality of the other Party. "International waters" is defined as "all parts of the sea not included in the territorial sea, internal waters and archipelagic waters of a State." The agreement further authorizes security forces of a Party to detain suspect ships, cargo, and persons on board pending instructions from the other

Party's security forces. The agreement is available at www.state.gov/documents/organization/180610.pdf.

6. Maritime Search and Rescue: Arctic Council Agreement

The Arctic Council held its Seventh Ministerial Meeting in Nuuk, Greenland March 11-12, 2011. Secretary Clinton attended the meeting, making it the first Arctic Council Ministerial to be attended by a U.S. secretary of state. At the Seventh Ministerial, it was decided to establish a standing secretariat of the Arctic Council, to be based in Tromsø, Norway, and agreement was reached on criteria for the admission of new observers to the Council. See May 12, 2011 State Department media note, available at www.state.gov/r/pa/prs/ps/2011/05/163283.htm.

On May 12, 2011, Secretary Clinton joined representatives of the other seven Member States of the Arctic Council in signing an Agreement on Cooperation on Aeronautical and Maritime Search and Rescue ("SAR") in the Arctic ("Agreement"). The State Department issued a fact sheet on the Agreement on that day, excerpted below, and available at www.state.gov/r/pa/prs/ps/2011/05/163285.htm.

* * * *

As Arctic sea ice coverage decreases, ship-borne activities are increasing significantly in the Arctic. Flight traffic is also on the rise as new polar aviation routes cross the Arctic air space in several directions. As human presence and activities in the Arctic expand, the potential for accidents increases as well. Limited rescue resources, challenging weather conditions, and the remoteness of the area render SAR operations difficult in the Arctic, making coordination among the Arctic nations imperative. The SAR Agreement will improve search and rescue response in the Arctic by committing all Parties to coordinate appropriate assistance to those in distress and to cooperate with each other in undertaking SAR operations. For each Party, the Agreement defines an area of the Arctic in which it will have lead responsibility in organizing responses to SAR incidents, both large and small. Parties to the Agreement commit to provide SAR assistance regardless of the nationality or status of persons who may need it.

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The signature of the SAR Agreement in Nuuk is a positive step toward building partnerships in the Arctic. In particular, it reflects the commitment of the Arctic Council States to enhance their cooperation and offer responsible assistance to those involved in accidents in one of the harshest environments on Earth.

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7. Immunity of Vessels

In February 2011, the United States received a diplomatic note from the ministry of foreign affairs of the Republic of Malta concerning the planned visit of T/S State of Maine to Malta in May 2011. The note conveyed the understanding of the ministry of foreign affairs that the T/S State of Maine did not meet the criteria for diplomatic clearance (recognizing its sovereign immunity) because the vessel was being used by the Maine Maritime Academy, a fee-billing institution. The United States responded with a March 21, 2011 diplomatic note providing more information about the planned visit of T/S State of Maine and the application of international law to that visit:

Under international law, as reflected in the UN Convention on the Law of the Sea, a vessel that is owned or operated by a state and used only on government noncommercial service is entitled to sovereign immunity. ...The T/S State of Maine is owned by the United States Government and has been provided to the Maine Maritime Academy under the provisions of the Merchant Marine Act of 1936, as amended... The purpose of the vessel's mission is to provide educational training to students... Maine Maritime Academy is a public educational institution. The vessel is not engaging in commercial service in the course of its at-sea mission...

...The United States notes that whether the Academy is a fee-billing institution is not relevant to whether this government-owned vessel is entitled to sovereign immunity while engaged exclusively in a maritime educational training cruise in furtherance of the government policies and objectives reflected in the Merchant Marine Act of 1936, as amended.

The United States would like to further convey that port visits by such training vessels is a long-standing practice in which requests for diplomatic clearances are routinely requested and received from port nations. In the past four years, for the T/S State of Maine and similarly situated U.S. training vessels, the United States has requested and received diplomatic clearances for more than 60 port calls in 30 countries. ...

In response, the ministry informed the U.S. in an April 20, 2011 note that diplomatic clearance had been granted for the planned visit of T/S State of Maine.

B. OUTER SPACE

On November 17, 2011, Deputy Assistant Secretary of State Frank A. Rose addressed the U.S. Strategic Command Cyber and Space Symposium in Omaha, Nebraska. His remarks were entitled "Leading with Diplomacy to Strengthen Stability in Space." The remarks, excerpted below, are available in full at www.state.gov/t/avc/rls/177306.htm.

* * * *

...The world is increasingly interconnected through, and increasingly dependent on, space systems. Our prosperity and security rely on communication, navigation, financial activities, and scores of other activities that depend on information derived from space systems. ... [A]ll nations must work together to adopt approaches for responsible behavior in space, and the United States, with our history of leadership in space, must lead the pursuit of potential solutions to these shared challenges.

Certainly no one in this audience needs to be reminded of the congested and contested nature of space, nor of the President's goals for expanding international cooperation, strengthening stability in space, and increasing assurance and resilience of mission-essential functions. However, some of you may not be familiar with the active leadership role and responsibilities the State Department and diplomacy have in addressing the President's goals.

Orbital Debris Mitigation

One issue that underlines the need for international cooperation and diplomacy is the growing presence of debris in space. There are now approximately 21,000 pieces of trackable debris 10 centimeters or larger in various Earth orbits—about 6,000 metric tons of debris orbiting the Earth. While some pieces of debris are simply “dead” satellites or spent booster upper stages still orbiting, and others are the results of accidents or mishaps, such as the 2009 Cosmos-Iridium collision, some debris is the result of intentionally destructive events, such as China's test in space of an anti-satellite weapon in 2007. Experts warn that the quantity and density of man-made debris significantly increase the odds of future damaging collisions. To address the growing problem of orbital debris, the United States, through the State Department, has expanded its engagement within the United Nations and with other governments and non-governmental organizations. We are continuing to lead the development and adoption of international standards to minimize debris, building upon the foundation of the U.N. Space Debris Mitigation Guidelines. We are also working to develop international and industry standards to slow down the accumulation of debris in space, and to develop and implement international “best practices” of responsible behavior in space that will put us all on a more sustainable path.

Space Situational Awareness

International cooperation is also necessary to ensure that we have robust situational awareness of the space environment. No one knows better than U.S. Strategic Command that even with the best technology and expertise available, no one nation has the resources to precisely track every space object. The U.S. National Space Policy implicitly recognizes this fact and thus directs us to collaborate with foreign governments, the private sector, and other organizations to improve our space situational awareness. One example of our efforts to cooperate internationally in the area of space situational awareness is our collaboration with Europe as it develops its own space situational awareness, or SSA system. The Department of State, in close collaboration with the Department of Defense, is currently engaged in policy and technical exchanges with regional and international organizations such as the European Union and the European Space Agency, as well as the governments of individual European allies. These discussions are considering approaches to protect our shared security interests as well as measures to ensure interoperability between our current and planned SSA architectures. Looking

ahead, we also see opportunities for cooperation on SSA with our allies and partners in the Asia-Pacific and other regions.

Prevention of Satellite Collisions

International cooperation is also essential to prevent future collisions through the sharing of information with other space-faring nations and our industry partners. As a result, we are seeking to improve our ability to share information with other space-faring nations as well as with our industry partners. The National Space Policy calls for international collaboration on the dissemination of orbital tracking information, including predictions of potentially hazardous conjunctions between orbiting objects. Such collaboration has the benefit of not only preserving the sustainability of space through the prevention of collisions, but improving our own capabilities to conduct expanded space object detection, characterization, and tracking and maintaining the space object catalogue. In coordination with U.S. Strategic Command, the Department of State is working to facilitate the rapid notification of space hazards via Conjunction Summary Messages by reaching out to all space-faring nations to ensure that the Joint Space Operations Center has reliable contact information for transmitting timely notification messages to both government and private sector satellite operations centers.

Critical Infrastructure Protection

The assurance and resilience of mission-essential functions also benefits from international collaboration. Led by the Department of State, Critical Infrastructure Protection workshops between the United States and the EU seek to identify trans-Atlantic interdependencies, vulnerabilities, and risk-mitigation strategies. The goal of these workshops is to increase the assurance and resilience of mission-essential functions that are enabled by commercial and civil spacecraft and supporting infrastructures against disruption, degradation, and destruction, whether from environmental, mechanical, electronic, or hostile causes. These workshops include the participation of U.S. Strategic Command, which is the lead within the Department of Defense for the protection of defense space critical infrastructures as well as the USG's responses to purposeful interference against U.S. space interests.

Bilateral and Multilateral TCBMs

The examples I just mentioned represent the new role the Department of State is taking in regards to national security space policy. However, we are also taking a more active leadership role within the functions traditionally within State's purview.

One of the ways the State Department is helping the United States move forward with ensuring safety, sustainability, stability, and security in space is through our pursuit of near-term, voluntary, and pragmatic transparency and confidence-building measures (TCBMs). TCBMs are means by which countries can address challenges and share information with the aim of creating mutual understanding and reducing tensions between countries. Through TCBMs we can address important areas such as orbital debris, space situational awareness, and collision avoidance, as well as increase familiarity and trust and encourage openness among space actors.

* * * *

The global reliance on space systems means that the challenges of operating in space cannot be addressed by a few parties, but must be recognized and tackled by many. To that end, the State Department engages on space in a variety of multinational fora, from the U.N. General Assembly to the Conference on Disarmament. We believe that efforts to adopt space TCBMs

should be built upon “bottom up” initiatives developed by government and private sector satellite operators as well as from “top down” government-to-government negotiations.

Therefore, the State Department is taking a leadership role in the working group of the UN Committee on the Peaceful Uses of Outer Space (COPUOS) on long-term sustainability. The long-term sustainability working group on space activities will be a key forum for the international development of “best practices guidelines” for space activities, including orbital debris mitigation, collision warning and avoidance, and space situational awareness. All of these activities can enhance spaceflight safety for space operators and are foundational to pursuing TCBMs that enhance stability and security.

The State Department is also anticipating next year’s Group of Government Experts (or GGE) on Outer Space TCBMs established by UN General Assembly Resolution 65/68. We support the full consideration of all helpful proposals for bilateral and multilateral TCBMs. Such proposals could include measures aimed at enhancing the transparency of national security space policies, strategies, activities and experiments or notifications regarding environmental or unintentional hazards to spaceflight safety. International consultations to prevent incidents in outer space and to prevent or minimize the risks of potentially harmful interference could also be a helpful TCBM to consider. We look forward to working with our international colleagues to engage in a GGE that serves as a constructive mechanism to examine voluntary and pragmatic TCBMs that enhance stability and security, and promote responsible operations in space.

The space environment is at serious risk from a number of sources, including space debris and a lack of transparency in the conduct of space activities. It is our belief that one of the most beneficial multilateral TCBMs for strengthening stability in space could be the adoption of “best practice” guidelines or an international “code of conduct.” A code of conduct could help establish guidelines for safe and responsible use of space, avoid collisions, reduce radiofrequency interference, and call out irresponsible behavior.

Unless the international community adopts positive measures to address irresponsible behavior in space, the environment around our planet will become increasingly hazardous to both human and robotic spaceflight. To that end, the United States is actively considering the European Union’s proposal for a non-legally binding, international “Code of Conduct for Outer Space Activities.” We have consulted with the EU over the past four years and see the EU’s initiative as a promising basis for an international Code of Conduct. Such a “Code,” if accepted by established and emerging space powers, could help promote best practices and ensure the long-term safety, sustainability, security, and stability of the space environment.

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Cross References

U.S. efforts to counter piracy, Chapter 3.B.8.

Immunity from attachment of multinational research satellite, Chapter 10.A.2.a.

Report to UN 1718 committee on U.S. attempt to board ship suspected of transporting proliferation-related items, Chapter 16.A.3.a.

Chapter 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. Meetings of major economies

In 2009, President Obama announced the inception of the Major Economies Forum on Energy and Climate (“MEF”). See *Digest 2009* at 485-88. The thirteenth session of the MEF took place on November 16-17, 2011 in Crystal City, Virginia and provided an opportunity for an exchange of views leading up to the Seventeenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change (“UNFCCC”) in Durban, South Africa (“COP-17”). See State Department November 16, 2011 Media Note, available at www.state.gov/r/pa/prs/ps/2011/11/177247.htm.

b. UN Framework Convention on Climate Change: Conference of the Parties

The United States participated in the Seventeenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change (“UNFCCC”) in Durban, South Africa, November 28-December 9, 2011. Among other outcomes, the Conference launched a process to develop, by 2015, an agreement that will apply from 2020. The decision by the Conference is available at

http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf. Among the notable features of the decision was the agreement to:

launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action.

2. Ozone Depletion

On May 9, 2011, the United States, Canada, and Mexico submitted a joint proposal to phase down use of hydrofluorocarbons (“HFCs”) under the Montreal Protocol on Substances that Deplete the Ozone Layer (“Montreal Protocol”). See *Digest 2010* at 542-44 and *Digest 2009* at 493-95 for past versions of the proposal to reduce the use of HFCs presented by the three countries. The three countries presented the proposal at the Twenty-third Meeting of the Parties to the Montreal Protocol, November 21-25, 2011. The report of the Twenty-third

Meeting of the Parties is available at <http://conf.montreal-protocol.org/meeting/mop23-cop9/draft-reports/Draft%20Reports/MOP-23-11-COP-9-7E.pdf>. The Department of State issued a media note describing the proposal, excerpted below and available in full at www.state.gov/r/pa/prs/ps/2011/05/162930.htm.

* * * *

Today, the United States, Canada, and Mexico have submitted a joint North American proposal to phase down the use of hydrofluorocarbons (HFCs) under the Montreal Protocol on Substances that Deplete the Ozone Layer. This joint effort represents a major step toward addressing the mounting threat of global climate change while also preserving the ozone protection benefits of the Montreal Protocol.

At last year's Meeting of the Parties, 90 countries signed a declaration recognizing that the projected increase in the use of HFCs poses a major challenge for the world's climate system. HFCs do not damage the ozone layer, but they are powerful greenhouse gases used as replacements for ozone-depleting substances that are being phased out under the Montreal Protocol. These 90 countries declared their intent to pursue further action to transition the world to environmentally sound alternatives to ozone-depleting substances.

Building on this commitment, the North American proposal calls on all countries to take action to reduce their consumption and production of HFCs. Developed countries would lead the effort beginning in 2015 to gradually phase down to 15% of baseline levels by 2033. Developing countries would take their first step to control HFCs in 2017, phasing down to 15% of baseline levels by 2043. The amendment proposal, backed by an accompanying decision proposal, also takes action to reduce HFC-23 byproduct emissions. A preliminary analysis by the U.S. Environmental Protection Agency indicates that the North American amendment proposal would produce a reduction benefit of more than 98 gigatons of carbon dioxide equivalent by 2050.

The problem of HFCs is closely linked with the phaseout of ozone-depleting compounds, including the ongoing accelerated phaseout of hydrochlorofluorocarbons (HCFCs). Without action, the HCFC phaseout and increasing global demand for refrigeration and air-conditioning are anticipated to drive continued growth in HFC production and consumption. Given the ongoing transition away from HCFCs, our proposal recognizes that this is the opportune time to encourage both the use of existing climate-friendly alternatives and the development of innovative, new alternatives that do not harm the ozone layer or climate system.

Together with our partners Canada and Mexico, the United States believes that global action on HFCs is needed and that the Montreal Protocol provides an established, effective and efficient instrument for tackling this problem. The United States looks forward to working with its partners in the run up to the 23rd Meeting of the Montreal Protocol Parties in November in Bali to make the most effective use possible of the tools available today to safeguard the ozone layer and protect the global climate system.

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3. Litigation in U.S. courts regarding greenhouse gas emissions

In 2011, the United States participated as a party in an appeal before the United States Supreme Court of an action brought against several power companies, including the Tennessee Valley Authority, which is a federal entity. *American Electrical Power Co. et al. v. State of Connecticut et al.*, Case No. 10-174. Plaintiffs, several U.S. states and some private entities, brought the action seeking to impose and enforce a scheme to control the power companies' emissions. The lower court had dismissed the case as involving a non-justiciable, political question. The U.S. Court of Appeals for the Second Circuit reversed, holding that the plaintiffs could maintain their actions under federal common law alleging that the power companies caused a "public nuisance" by contributing to global warming, reasoning, in part, that the federal government had not yet acted to limit emissions. 582 F.3d. 309 (2nd Cir. 2009).

The Supreme Court decided the case on June 20, 2011. *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011). A majority of the court agreed that actions by the Environmental Protection Agency ("EPA") authorized by the Clean Air Act ("CAA") displace any federal common-law right to seek abatement of emissions. 131 S.Ct. at 2539. The court reasoned:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. See generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865–866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," ... and then decide what level of reduction is "practical, feasible and economically viable," These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs. Similar suits could be mounted, counsel for the States and New York City estimated, against "thousands or hundreds or tens" of other defendants fitting the description "large contributors" to carbon-dioxide emissions. ...

The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same

limits, subject to judicial review only to ensure against action “arbitrary, capricious, ... or otherwise not in accordance with law.” § 7607(d)(9).

Id. at 2539-40.

The United States opening brief in the case when it was before the U.S Supreme Court, filed in January 2011, presented the argument—which was accepted by a majority of the Supreme Court in its decision—that the regulation of emissions had been displaced by federal action, in particular actions by the EPA authorized by the CAA. Excerpts discussing this displacement argument from the United States opening brief follow. The brief is available at www.justice.gov/osq/briefs/2010/3mer/2mer/2010-0174.mer.aa.pdf. The U.S. reply brief is available at www.justice.gov/osq/briefs/2010/3mer/2mer/2010-0174.mer.rep.pdf.

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Instead of relying on any CAA standards or cause of action, plaintiffs have elected to sue a handful of defendants from among an almost limitless array of entities that emit greenhouse gases. Moreover, the types of injuries that plaintiffs seek to redress, even if concrete, could potentially be suffered by virtually any landowner, and to an extent, by virtually every person, in the United States (and, indeed, in most of the world). ...

* * * *

...[The Court] should hold that plaintiffs cannot state a claim for public nuisance under federal common law because any such claim has been displaced by the actions that EPA has taken under the CAA to regulate carbon-dioxide emissions.

* * * *

Exercising its regulatory authority under the CAA, EPA has directly entered the field plaintiffs would have governed by common-law nuisance suits. Since January 2, 2011, greenhouse gases have been subject to regulation under the CAA, and EPA is actively exercising its judgment and statutory discretion to determine when and how emissions from different categories of sources of greenhouse gases will be regulated. As a result, the CAA, as implemented by EPA, speaks directly to the question of how carbon-dioxide emissions should be limited and thus displaces any common-law claims pertaining to that question.

* * * *

...EPA now regulates greenhouse-gas emissions under the currently existing statutory scheme of the CAA, and it may soon be specifically committed to completing a rulemaking to address greenhouse-gas-emissions standards applicable to defendants’ already-existing power plants, even if they are not modified. Thus, it is abundantly

clear that the CAA, as it is now being implemented by EPA, “speak[s] directly” (*Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil*, 436 U.S. at 625)) to the particular issue presented by plaintiffs’ federal common-law nuisance claims about climate change: regulation of greenhouse-gas emissions, and in particular emissions from stationary sources (like defendants’ power plants).

* * * *

4. Sustainable Development

In 2011, the United States participated in the preparatory process for the United Nations Conference on Sustainable Development (“Rio+20”), set to take place in Rio de Janeiro, Brazil in June 2012 coinciding with the 20th anniversary of the 1992 United Nations Conference on Environment and Development in Rio in 1992. Rio+20 is to focus on two themes: a green economy in the context of sustainable development and poverty eradication and the institutional framework for sustainable development. Participants were invited to make submissions by November 1, 2011 for inclusion in a compilation to serve as the basis for preparation of a draft outcome document for the Conference in 2012. The United States made its submission on November 1, 2011. The United States submission, excerpted below, included the U.S. view that the United Nations Environment Program (“UNEP”) should be strengthened rather than creating a new institution to coordinate environmental programs and cooperation. The full text of the submission is available at www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=370&menu=20.

* * * *

OUR VISION

The United States welcomes the opportunity to join the global community and engage representatives from across society to chart a course for the future of sustainable development. At the upcoming UN Conference on Sustainable Development (Rio+20) we aspire to explore ways to better integrate the economic, social, and environmental dimensions of sustainable development, building on the successes of the 1992 Earth Summit and the 2002 World Summit on Sustainable Development. Since we last convened, world population has risen to 7 billion and is expected to increase to 9 billion by 2050, with many still living on less than \$2.00 a day. Rio+20 must prioritize resource productivity and efficiency as ways to promote sustainable development. At the same time, global institutions have shifted to recognize the rise, roles, and responsibilities of major emerging economies. Within this new landscape, we recognize that sustainable development is not a luxury; it is a necessity for countries at all stages of development.

The Obama Administration has set a strong foundation and trajectory for enhancing sustainability and building a green economy at home and abroad. Our Global Development Policy recognizes that sustainable development offers a promise of long-term, inclusive, and enduring growth that builds on accountability, effectiveness, efficiency, coordination, and innovation. Rio+20 should seek to make governments around the world more transparent and

accessible, to better engage citizens, and to build new networks across all sectors of our societies. The role of women and youth is also fundamental to securing a sustainable future.

We recognize that sustainable development offers pathways out of short-term disruptions, such as financial shocks, and long-term challenges, such as climate change. We are also committed to spurring developments in science and innovation through the use of incentive systems; investments in education, the workforce, and basic research; and promoting innovative, open, and competitive markets, supported by strong protection for intellectual property rights and transparent, science-based, regulatory approaches and standards. Respect for international obligations as we chart a future course for sustainable development is also critical.

At Rio+20, the global community should re-energize action on sustainable development through a concise, political statement that focuses on actionable high-level messages. Each conference participant should also come to Rio with their own “compendium of commitments” that describes in detail how the individual groups or coalitions of participants will undertake action to help build a sustainable future. The meeting itself should be a marketplace of ideas, and we look forward to presentations, side events, and the launch of networks and initiatives during the civil society days and the Conference that advance inclusive action on sustainable development.

In this submission, we highlight three key messages that speak to the evolving sustainable development agenda:

* * * *

THE INSTITUTIONAL ENVIRONMENT: MODERNIZING GLOBAL COOPERATION

Making New Connections: Linking Governments, Communities, and Businesses for Action

The second theme of Rio+20, Institutional Framework for Sustainable Development (IFSD), speaks to how participants in the Conference and broader networks of stakeholders can achieve the goals of sustainable development. ...

... Governments should strive to create the enabling environments to allow innovation to flourish and to spur greater investment in the development and application of ground breaking technologies to solve global challenges. This February [2012], the United States will host a conference on “*Rio+20: Bridging Connection Technologies and Sustainable Development*” as one way to identify strategic opportunities to generate solutions to specific challenges.

The world’s youth have an enormous stake in the outcomes of Rio+20 and can play a powerful role in defining the next generation of sustainable development using the technologies of the future. There is also a strong case for the inclusion of women as a vital source of economic growth. Every individual has the opportunity to be a contributing and valued member of the global marketplace—globally, we must support removing barriers that have prevented youth and women from being full participants in the economy and unlocking their potential as drivers of economic growth.

Transforming Traditional Institutions

At the 1992 Earth Summit, leaders recognized the importance of transparent, participatory decision-making at the national level. These dialogues focused on brick-and-mortar institutions. Today, technology is making it easier for governments to share information with the public and for the public to hold decision makers accountable to realize the promise of Principle 10 through diverse and diffuse networks. The Rio+20 Conference is an opportunity to further enhance these efforts – for all participants to share best practices on good national governance

and explore cooperative actions to deepen implementation through formal institutions and informal networks.

The UN system needs to identify a focal point to efficiently bring together the environmental, economic, and social elements of sustainable development. We see an opportunity to reform and modernize existing institutions, such as the Commission on Sustainable Development (CSD) and the Economic and Social Council (ECOSOC), in a manner that engages the entire UN system and provides the UN with cohesive, government-driven policy guidance on sustainable development, a vehicle for engaging civil society, non-government, and private sector stakeholders, and a coordination mechanism to track overall progress.

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Strengthening International Environmental Governance (IEG)

We agree that the UN needs a body through which governments can cooperate to recommend environmental policies, promote best practices, and build national capacity for governance, monitoring, and assessment. That institution – the United Nations Environment Program (UNEP) – already exists and at Rio+20 we need to work together to strengthen it within the UN system to assure a viable environmental pillar that can meet 21st century demands. We do not believe that alternative proposals for a new statutory institution on the environment will strengthen environmental governance or solve any of the problems that we all recognize persist. We think the more effective course is to focus intellectual and financial resources on strengthening existing institutions that have already proven their worth and avoid the distraction of trying to set up something new and untested.

At Rio+20, we want to pursue reforms to increase UNEP's stature and capacity to contribute to sustainable development commensurate with the importance we attach to these issues. Reforms might include seeking universal membership in UNEP, under appropriately-altered governance structures; enhancing UNEP's leadership within the UN system on implementation and science; and strengthening UNEP's ability to assist countries committed to good governance and science-based decision-making in a manner that creates positive spillover into the economic and social domains of development. These reforms can also improve UNEP's operational efficiency by streamlining administrative arrangements of key multilateral environment agreements.

* * * *

Informing Decisions, Catalyzing Action, and Measuring Progress

Efforts to help countries obtain and provide environmental information to their citizens and global experts are important contributions to Rio+20. For sustainable development to take hold, policies must be based on sound science and reliable data. With advances in technology, it is now quicker and less costly to collect, monitor, assess, and disseminate data. Countries need to have the capacity to monitor the environment and to integrate that data with economic and social development plans. The United States is cooperating internationally through other fora to share environmental information and promote the use of compatible data systems so that we can better identify where we are achieving sustainable outcomes and where work still remains to be done.

In this vein, Sustainable Development Goals (SDGs), if structured correctly, could be a useful means to assess progress, catalyze action, and enhance integration among all three pillars of sustainable development. Any goals that we might set should go beyond measuring traditional

assistance and towards data-driven and evidence-based tracking of intermediate and end outcomes that are realized through all sources of investment in the green economy. We believe the concept of sustainable development goals is worthy of consideration at Rio+20, and that the discussions at Rio+20 can inform ongoing and future deliberations about the Millennium Development Goals (MDGs) as we approach 2015.

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B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Air Pollution from Ships: IMO Adoption of Efficiency Standards

On July 15, 2011, the Parties to Annex VI of the International Convention for the Prevention of Pollution from Ships ("MARPOL"), acting through the International Maritime Organization ("IMO"), amended Annex VI to include energy efficiency standards for certain new ships. An EPA fact sheet explained the new program:

The International Maritime Organization has adopted first-ever energy efficiency design standards for new ships. Under this new program, an Energy Efficiency Design Index (EEDI) will be required for new ships, with progressively more stringent efficiency targets phasing in beginning in 2013.

...The EEDI creates a common metric to measure and improve new ship efficiency. This metric is calculated as the rate of carbon dioxide (CO₂) emissions from a ship per transport work performed by the ship. CO₂ emissions are directly related to energy efficiency and are calculated as fuel consumption multiplied by a fuel carbon factor. Transport work is calculated as a function of the cargo capacity of the ship and the design ship speed.

... The EEDI applies to the most energy-intensive segments of the international shipping fleet, representing more than 70 percent of ship emissions.

...A recent study by IMO projects that emissions from shipping will increase 150 percent to 250 percent by 2050 in the absence of policies to reduce emissions.

The IMO study also shows that many options exist to improve the efficiency of new ships, thereby reducing fuel consumption and emissions. The measures identified by the study include hull improvements, propeller/propulsion system upgrades, alternative power options (e.g., towing kite), hull coatings, propeller improvements, auxiliary systems, speed reduction, and main engine improvements.

Although technologies and methods are available today that can be used to improve energy efficiency and therefore achieve cost savings, standards in the form of energy efficiency targets such as the EEDI are needed to provide an incentive for the implementation of this technology. While many of these efficiency improvements will pay for themselves through fuel savings, there are non-financial barriers that prevent their use. These non-financial barriers include 1) fuel price uncertainty, 2) split incentives between owners, operators, and shipyards and 3) lack of good information on

the fuel efficiency improvements for different technologies, and impact on life cycle costs.

... This efficiency improvement has beneficial energy implications due to reduced oil consumption. More efficient ships will also emit lower amounts of criteria pollutants such as oxides of nitrogen (NO_x), oxides of sulfur (SO_x), and particulate matter (PM).

The full text of the fact sheet is available at

www.epa.gov/otaq/regs/nonroad/marine/ci/420f11025.pdf.

2. Fish and marine mammals

a. Illegal, unreported, and unregulated fishing

(1) Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing

On November 14, 2011, President Obama submitted to the Senate, for its advice and consent, the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. See *Digest 2009* at 499-500 for background on the agreement. A Media Note issued by the State Department, excerpted below and available at www.state.gov/r/pa/prs/ps/2011/11/177154.htm, described the effects and importance of the agreement.

* * * *

Illegal, unreported and unregulated (IUU) fishing is a global problem that threatens healthy ocean ecosystems and sustainable fisheries. It undermines the sustainable practices of legitimate fishing operations in the United States, and elsewhere, and presents unfair market competition to sustainable seafood products. An estimated \$10 to \$23 billion in global value is lost annually due to IUU fishing.

All fish caught commercially at sea must eventually come to port. The Port State Measures Agreement requires nations that are party to the Agreement to take a number of practical steps to deny port entry and access to port services to foreign fishing and transport vessels that have harvested fish in violation of applicable rules or have supported such fishing.

Following calls from Congress to crack down on illegal fishing worldwide, the United States played an active role in the negotiation and adoption of this Agreement at the Food and Agriculture Organization of the United Nations. The United States was among the nations that signed the Agreement when it was adopted in 2009. To date, 22 nations and the European Union have signed the Agreement, and it will take effect once 25 nations have ratified it. Three nations and the European Union have completed their ratification procedures for the Agreement.

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The Department of State, along with the Department of Commerce and other interested agencies, looks forward to working with the Senate, with a view to securing advice and consent to ratification of the Agreement. The Administration also looks forward to working with both Houses of Congress on legislation to implement the Agreement.

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In his message to the Senate transmitting the Agreement for advice and consent to ratification, President Obama summarized the importance of the Agreement as follows:

The Agreement established, for the first time at the global level, legally binding minimum standards for port states to control port access by foreign fishing vessels, as well as by foreign transport and supply ships that support fishing vessels. The Agreement also encourages Parties to apply similar measures to their own vessels. Involved Federal agencies and stakeholders strongly support the Agreement. The Agreement establishes practical provisions to prevent fish from illegal, unreported, and unregulated fisheries from entering the stream of commerce. If widely ratified and properly implemented, the Agreement will thereby serve as a valuable tool in combating illegal, unreported, and unregulated fishing worldwide.

Daily Comp. Pres. Docs., 2011 DCPD No. 00867, p. 1.

(2) Report to Congress on Implementation of Title VI of the Magnuson-Stevens Fishery and Conservation Reauthorization Act of 2006

In January 2011, the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (“NMFS”) submitted its biennial report to Congress pursuant to § 406 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2007 (“MSRA”), Pub. L. No. 109-479, 120 Stat. 3575, 3633. For background on the MSRA, see *Digest 2007* at 706-709; for discussion of the first biennial report submitted in 2009, see *Digest 2009* at 500-05. The 2011 Report identified Colombia, Ecuador, Italy, Panama, Portugal, and Venezuela as states having engaged in IUU fishing during 2009 or 2010. The MSRA also requires identification of states having vessels engaged in bycatch of protected living marine resources (“PLMRs”), but no states were so identified in the report. The 2011 Report also described the corrective actions, new laws, regulations or enforcement activities of the countries identified in the 2009 report leading to the NMFS’s certification that each of those six countries (France, Italy, Libya, Panama, and the People’s Republic of China) had either provided evidence of corrective action or credibly disputed the original identifications, as required by the MSRA. Excerpts from the report explaining the identifications follow (with footnotes omitted). The full text of the report is available at www.nmfs.noaa.gov/msa2007/docs/biennia_report_to_congress.pdf.

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NMFS identified six countries in the 2009 Report to Congress as having vessels engaged in IUU fishing activity: France, Italy, Libya, Panama, the People's Republic of China, and Tunisia. Each incident of IUU fishing involved an alleged violation of the rules of an international fishery management organization in 2007 or 2008. Under Section 609 of the Moratorium Protection Act, within 90 days of promulgation of a final rule establishing a procedure for certification, and biennially thereafter in the report to Congress, the Secretary must certify to Congress whether an identified nation has taken appropriate corrective action to address the activities for which it has been identified. The NOAA Assistant Administrator for Fisheries has been delegated the authority to make that determination.

After notifying the six countries of their identifications in early 2009, the U.S. Government consulted extensively with those governments, through face-to-face meetings, teleconferences, and correspondence, through the fall of 2010. The six governments provided information that falls into several categories:

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The rest of this section sets out in detail the consultations that occurred with each identified country, the information produced by those countries about corrective actions such as penalties imposed and fisheries management laws adopted, and NMFS's positive certification for each country. In short, however, the identification, consultation, and certification process in 2009-2010 worked as Congress intended, to promote compliance with international fisheries measures.

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B. Identifications

1. Statutory Requirements and Restrictions

Section 403 of the MSRA, in amending the Moratorium Protection Act, requires that the Secretary identify nations whose vessels are engaged in IUU fishing or PLMR bycatch. The identification process and decisions, in turn, are based on detailed criteria set forth in the act, as well as statutory definitions.

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2. The Identification Process

In preparation for development of the list of nations that are recommended for identification, NMFS published a notice soliciting information on IUU fishing and PLMR bycatch activities (75 Fed. Reg. 10213, March 5, 2010).

Fishing in Violation of International Measures. The first prong of the definition of IUU fishing covers activities that violate measures required under an international fishery management agreement to which the United States is a party (16 U.S.C. 1826j(e)(3)(A)). ...

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Overfishing of Shared Stocks. The second prong of the definition of IUU fishing (16 U.S.C. 1826j(e)(3)(B)) includes overfishing of stocks shared by the United States in areas without applicable international measures or management organizations. ...

Destructive Fishing Practices on [Vulnerable Marine Ecosystems (“VMEs”)]. During the reporting period, NMFS found no nations having conducted IUU fishing activities under the third prong of the definition (16 U.S.C. 1826j(e)(3)(C)). ...

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PLMR Bycatch Activities. Identification of nations for bycatch activities may be based only on current activities of fishing vessels of that nation, or on activities in which those vessels have been engaged during the calendar year preceding submission of the biennial report to Congress. Qualifying activities are further restricted to those that result in the bycatch of PLMRs where the relevant international conservation organization has failed to implement effective measures to end or reduce such bycatch, or the nation is not a party to or a cooperating partner with such organization, and the nation has not adopted a regulatory program governing such fishing practices that is comparable to that of the United States, taking into account different conditions. Bycatch activities that fail to meet these standards cannot form the basis for identification.

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3. Countries Identified

NMFS is identifying six countries as having vessels engaged in IUU fishing activity during 2009 and 2010: Colombia, Ecuador, Italy, Panama, Portugal, and Venezuela. Each incident of IUU fishing involved an alleged violation of the rules of an international fishery management organization. The remainder of this section describes in detail the bases for identification for each country, along with other pertinent information and any communications with the governments.

Colombia. No Colombian-flagged vessels adhered to the purse seine closure periods that were in place for tuna conservation in 2009, in violation of IATTC Resolution C-09-01. The Government of Colombia noted at the 2009 and 2010 IATTC meetings that it could not implement the IATTC’s closure periods because it had already adopted purse seine closures for 2009 on an individual vessel basis prior to the adoption of IATTC Resolution C-09-01. Colombia, however, joined the consensus allowing C-09-01 to become effective. Colombia’s 2009 individual closures were of shorter duration and, thus, less restrictive than the requirements set forth in Resolution C-09-01.

In addition, two vessels flagged to Colombia have been fishing in the IATTC Convention Area in 2009 and 2010 without being on the IATTC Regional Vessel Register, in violation of IATTC Resolutions C-00-06 and C-02-03. Resolution C-00-06 requires that any vessel fishing for tuna and tuna-like species in the Eastern Pacific Ocean must be included on the IATTC Regional Vessel Register. Resolution C-02-03 establishes national capacity limitations in the purse seine fishery and requires that any active purse seine vessel be included on the Regional Vessel Register and be within these capacity limits. The *Marta Lucia R* made four trips and the *Dominador I* six trips in 2009, without being on the IATTC Regional Vessel Register because the capacity currently allocated to Colombia by the IATTC is not sufficient to accommodate these vessels.

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Ecuador. Several purse seine vessels flagged to Ecuador fished in the IATTC Convention Area in 2009 without authorization, in violation of Resolutions C-00-06 and C-02-03. The *Ocean Lady* made five fishing trips in 2009 before being added to the IATTC Regional Vessel Register in March 2010. The owner was granted a fishing license on September 7, 2009, but Ecuador did not make a request to IATTC for entry in the vessel register until March 4, 2010. Ecuador noted at the 2010 IATTC meeting that the government has initiated an administrative proceeding against this vessel, which could result in a penalty for fishing without authorization.

The *Cap. Tino B.* made two fishing trips in 2009 before being included on the IATTC Regional Vessel Register in April 2009. The owner was granted a fishing license on February 12, 2009, but Ecuador did not make a request for entry in the vessel register until April 15, 2009. Ecuador noted at the 2010 IATTC meeting that this vessel is being sanctioned for fishing without authorization. Ecuador stated that it has taken corrective action with regard to the *Ocean Lady* and the *Cap. Tino B.*, but has not yet supplied documentation to that effect.

The *Tuna I* made three fishing trips in 2009 without being on the IATTC Regional Vessel Register. According to the Government of Ecuador, the case against this vessel is pending.

Several other vessels made sets during the purse seine closure of the off-shore area in 2009, in violation of IATTC Resolution C-09-01. The *Lizy* made two sets during that closure. Ecuador noted at the 2010 IATTC meeting that there were proceedings against the *Lizy*. According to the Government of Ecuador, this vessel has been absolved; however, no details were provided.

The *Ocean Lady* also failed to adhere to the 2009 closure. Another vessel, the *Ingalapagos*, made short trips during the 2009 IATTC closure period without an observer or transit waiver, in violation of IATTC Resolution C-09-01. Ecuador noted at the 2010 IATTC meeting and reaffirmed in correspondence that an administrative proceeding against this vessel is pending.

The *Tarqui* increased its capacity, contrary to IATTC Resolution C-02-03. According to the delegation from Ecuador at the 2010 IATTC meeting and correspondence to NMFS, Ecuador has initiated an enforcement proceeding against this vessel; it is pending.

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Italy. During 2009 and 2010, many vessels flagged to Italy fished in violation of ICCAT Recommendation 03-04, which prohibits the use of driftnets for fisheries on large pelagic species, including swordfish and bluefin tuna, in the Mediterranean. Several Italian-flagged vessels were found with *spadara* nets (a type of driftnet used to target swordfish) and *ferrettara* nets (small-mesh driftnets), and with large pelagic species on board. This illegal driftnet activity is described in more detail below and documented in Italian Coast Guard and NGO reports. Italy penalized these vessels through seizure of their catch and nets and the imposition of fines of approximately €2,000 each. The Italian reports demonstrate that some Coast Guard divisions under the direction of that organization's Central Command are conducting enhanced operations to detect illegal driftnet fishing. Violations continue, however, including offenses involving the same vessels.

In July 2009, the *Federica II* was found to have 13 km of *spadara* net and 853 kg of fish onboard. Italy sanctioned the vessel for carrying out commercial fishing using *spadara*, and confiscated 16 swordfish, 24 bluefin tuna, and the nets. Two of the swordfish and 20 of the

bluefin tuna were under the permissible size limit. The *Federica II* had four previous *spadara* and *ferrettara* driftnet violations between 2005 and 2008.

Also in July 2009, the *Maria Ilenia* was found with 16.6 km of driftnet onboard and approximately 1,400 kg of fish. The vessel was sanctioned for carrying out commercial fishing using a 16-km *spadara* net and a *ferrettara* net 600 meters longer than allowed. The catch, consisting of 59 swordfish, four yellowfin tuna, and one fish of unidentified species, for a total weight of 1458.7 kg, along with the nets. Eighteen of the swordfish were smaller than the size limit. The *Maria Ilenia* had a previous *ferrettara* driftnet violation in 2009.

The *Unita' Da Diporto* was sanctioned for carrying out commercial fishing in the summer of 2009 using a 4.5 km *spadara* net. Two swordfish and 27 tuna, with a total weight of 210 kg, were seized along with the net. In August 2009, the *Andrea Doria II* was found with a 15.5 km *spadara* net and 500 kg of swordfish onboard. The vessel was sanctioned for illegal driftnet use by seizure of the swordfish and net. This vessel also had a driftnet infraction in 2006. In August 2009, the *Ross Lucy* was found with *spadara* net and 500 kg of swordfish onboard. Italy sanctioned the vessel for driftnet fishing with seizure of the net and swordfish. The *Ross Lucy* also had a 2006 driftnet violation.

In addition to the previously mentioned vessels, four others were found with *ferrettara* and bluefin tuna on board. Since these vessels had bluefin tuna, they were found to be fishing in contravention of ICCAT Rec. 03-04. The *Maestrale*, sanctioned in April 2010, was caught with 1,076 kg of bluefin tuna, of which 33 fish were under permissible size limits. This vessel also had a *spadara* driftnet infraction in 2008. The *Anna Maria I* was sanctioned in April 2010 after being caught with 837.5 kg of bluefin tuna, of which 81 fish were undersized. This vessel also had a *spadara* infraction in 2008. Two vessels were sanctioned in June 2010: the *Santa Maria A Mare*, after being caught with 120 kg of bluefin tuna, and the *San Saverio*, with 300 kg of undersized bluefin tuna.

The repeat driftnet infractions indicate the need for additional measures to deter this type of IUU activity, including, *inter alia*, implementation of more severe sanctions as allowed under Italian law, such as suspension of fishing authorization or licenses.

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Panama. Several Panamanian-flagged vessels engaged in fishing activities that violated IATTC conservation and management measures. Among these vessels, several were reported to have fished within the IATTC Convention Area during purse seine closure periods, in violation of IATTC Resolution C-09-01. The *Julie L* made at least one set in the high seas closure area in 2009, and the *La Parrula* at least 30 sets in two trips during the IATTC 2009 purse seine closure. According to the Government of Panama, an investigation carried out by Panamanian authorities on the *Julie L* showed evidence of lack of VMS transmission, in violation of a domestic law, for which a sanction has been applied. ARAP informed the United States that an investigation was opened for the *Julie L* within the penal process for fishing during the closure period. ARAP provided assurance that investigations and proceedings will continue.

The *Sirenza I* was not in port in 2009 at the beginning of the purse seine closure, also in violation of IATTC Resolution C-09-01, which requires members to ensure that at the time a closure begins, and for the entire duration of that period, all purse seine vessels fishing for yellowfin, bigeye, or skipjack tunas that are subject to the closure are in port or obtain a transit waiver to leave port.

The *Tunamar* made one trip in May 2009 while not on the IATTC Regional Vessel Register, in violation of Resolutions C-00-06 and C-02-03. This vessel was added to the IATTC Regional Vessel Register on July 2, 2009. A Panamanian agency is conducting an internal investigation to ascertain the responsibility of the official who authorized the *Tunamar* to fish without being registered with IATTC. According to the delegation from Panama at the 2010 IATTC meeting, sanctions have been issued against this vessel.

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Portugal. Two vessels flagged to Portugal engaged in fishing activities during 2010 that violated conservation and enforcement measures of NAFO. The *Aveirense* was found in the NAFO Regulatory Area on March 10, 2010, by Canadian inspectors and in port on July 12, 2010, in apparent infringement of a NAFO conservation and enforcement measure (Chapter I, Article 13.6) because the mesh in the cod end of the net was obstructed. These incidents are under investigation. Further information from the NAFO Secretariat confirms the infringement that was detected by the Canadian inspectors. According to the Government of Portugal, with respect to the *Aveirense*, it brought a proceeding against the captain and the ship owner; the case is pending.

The *Franca Morte* was inspected at sea on April 1 and 2, 2010, and in port on April 29, 2010, and was found to be using smaller than the required mesh size on two of the four panels of the fishing trawl, an infringement of Chapter I, Article 13. EU inspectors confirmed that this was an infringement as detected and reported by Canadian inspectors. The EU Report on Infringement dated August 2010 indicates that a case is pending against this vessel. According to the Government of Portugal, a final decision has been reached in the proceeding against this vessel. However, no further information was provided on the nature of this decision or any resulting action to be taken against the vessel.

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Venezuela. Two vessels flagged to Venezuela were reported to have fished during IATTC purse seine closure periods in 2009, in violation of IATTC Resolution C-09-01. The *Don Francesco* made 19 sets during the purse seine closure in the Eastern Pacific Ocean. The *Athena F* made a transit trip without an observer or a transit waiver during the closure period in 2009, in violation of IATTC Resolution C-09-01, which requires members to ensure that during a closure all purse seine vessels subject to the closure are in port or obtain a transit waiver to leave port.

* * * *

On January 12, 2011, the Commerce Department's National Oceanic and Atmospheric Administration ("NOAA") issued a final rule setting forth procedures for the identification and certification of foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs. 76 Fed. Reg. 2011 (Jan. 12, 2011). The Supplementary Information section in the Federal Register explained:

The [MSRA] does not require publication of identification procedures in a rule, but in the interest of transparency and to provide context for subsequent certification determinations, NMFS decided to address identification in this action. NMFS made its

first identifications in the January 2009 Biennial Report to Congress based on authority provided in the Moratorium Protection Act only, as these regulations were not yet in place.

Excerpts follow from the Federal Register publication of the final rule, explaining the procedures for, and effects of, the certifications and identifications made in the biennial reports to Congress.

* * * *

Procedures To Identify Nations Engaged in IUU Fishing

As required under the Moratorium Protection Act, NMFS will identify, and list in the biennial report to Congress, that those nations whose fishing vessels are engaged, or have been engaged at any point during the preceding 2 years, in IUU fishing.

When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will exercise due diligence in evaluating appropriate information and evidence available to the agency. This information could include data, gathered by the U.S. Government as well as offered by other nations, international organizations (such as regional fisheries management organizations (RFMOs)), institutions, or arrangements that, if true, could support a determination that a nation's vessels have been engaged in IUU fishing. NMFS will review and verify the pertinent information when determining, for the purposes of identification, whether a nation's fishing vessels are engaged, or have been engaged, during the preceding 2 years in IUU fishing as defined under the Moratorium Protection Act.

Once NMFS has determined that the information received is credible and provides a reasonable basis to believe or suspect that a nation's fishing vessels are engaged in IUU fishing, NMFS, acting through or in consultation with the State Department, will initiate bilateral discussions with the nation to:

- Seek corroboration of the alleged IUU activity or credible information that refutes such allegations;
- Communicate the requirements of the Moratorium Protection Act to the nation; and
- Encourage such nation to take action to address the alleged IUU fishing activity in question.

Prior to making identifications, NMFS will consider measures taken by the nation to address the IUU fishing activity of its vessels, information refuting allegations of IUU fishing activity, and domestic laws or regulatory programs designed to address IUU fishing activity, along with all verified information on alleged IUU fishing activity.

In determining whether to make an IUU fishing identification, NMFS will consider whether a nation has implemented and is enforcing measures that are deemed comparable in effectiveness to measures implemented by the United States to address the pertinent IUU fishing activity. NMFS will also consider if an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place, whether or not the nation is party to or maintains cooperating status with the organization, and whether or not the relevant RFMO has adopted measures that are deemed by NMFS to be effective at addressing such IUU fishing activity. If the nation is a party or cooperating non-party to the

relevant RFMO, NMFS will consider whether the nation has implemented and is enforcing measures of that organization.

Measures by nations to address IUU fishing could include those that reflect the recommendations of international organizations to prevent, deter and eliminate IUU fishing. ...

Notification of and Consultations With Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will notify:

1. Nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding 2 calendar years, in IUU fishing activities;

2. Identified nations of the requirements under the Moratorium Protection Act and this subpart; and

3. Any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing.

Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding 2 calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

Procedures To Certify Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Subsequent to the identification, notification, and consultation processes outlined above, the Secretary will provide either a positive or negative certification to nations that have been identified in the biennial report as having fishing vessels engaged in IUU fishing. The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. ...

* * * *

The Secretary of Commerce will make certification determinations pursuant to provisions of the Moratorium Protection Act in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner. When considering whether appropriate corrective action has been taken to warrant a positive certification, NMFS will take into account the outcome of consultations with the identified nation and comments received from such nation. NMFS will also evaluate actions taken by the relevant nation and applicable RFMO to address the IUU fishing activity described in the biennial report, including participation in applicable RFMOs and requests for assistance in building fisheries management and enforcement capacity. NMFS will also consider, as appropriate, whether the affected nation has implemented and is enforcing RFMO conservation and management measures designed to address IUU fishing activities.

The Secretary of Commerce will make the first certification determinations no later than 90 days after promulgation of this rule. Subsequent certification determinations will be published in the biennial report. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with negatively certified nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities described in the biennial report to Congress.

Procedures To Identify Nations Engaged in PLMR Bycatch

As required under the Moratorium Protection Act, NMFS will also identify, and list in the biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged during the preceding calendar year in fishing activities either in waters beyond any national jurisdiction that result in PLMR bycatch, or beyond the U.S. exclusive economic zone (EEZ) that result in bycatch of a PLMR shared by the United States.

* * * *

Pursuant to the requirements under the Moratorium Protection Act, NMFS will publish a list of nations that have been identified as having fishing vessels engaged in bycatch of PLMRs in the biennial report to Congress.

Notification and Consultation With Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

After submission of the biennial report to Congress, the Secretary of Commerce, acting through the Secretary of State, will officially notify nations that have been identified in the biennial report as having fishing vessels that are engaged in bycatch of PLMRs. Within 60 days after submission of the biennial report to Congress, NMFS, acting through or in consultation with the State Department, will notify such nations of the requirements of the Moratorium Protection Act and initiate consultations regarding the bycatch of PLMRs.

Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will:

1. Initiate consultations with the governments of identified nations for the purposes of entering into bilateral and multilateral agreements and treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

2. Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, request that the Secretary of State initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

International Cooperation and Assistance

To the greatest extent possible consistent with existing authority and the availability of funds, NMFS shall provide assistance to nations identified as having vessels engaged in PLMR bycatch. NMFS will also provide assistance to international organizations of which those nations are members to assist with qualifying for a positive certification. Assistance activities may include, where appropriate, cooperative research activities on species assessments and improved bycatch mitigation techniques, improved governance structures, or improved enforcement capacity. NMFS will also encourage and facilitate the transfer of appropriate technology to identified nations or the organizations of which they are members to assist identified nations in

qualifying for a positive certification and to assist those identified nations or organizations in designing and implementing appropriate fish harvesting methods that minimize bycatch of PLMRs.

Procedures To Certify Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

Based on the identification, notification, and consultation processes outlined above, NMFS will certify nations that have been identified in the biennial report as having fishing vessels engaged in bycatch of PLMRs. NMFS will notify nations prior to a formal certification determination and will provide such nations an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the bycatch of PLMRs described in the biennial report to Congress.

* * * *

The Secretary of Commerce will make certification determinations pursuant to provisions of the Moratorium Protection Act in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner. When making certification determinations, the Secretary of Commerce will, in consultation with the Secretary of State, evaluate the information discussed above, comments received from such nation, the consultations with each identified nation, and subsequent actions taken by the relevant nation to address the bycatch of PLMRs described in the biennial report, including requests for assistance in the implementation of measures comparable to those of the United States and establishment of an appropriate management plan. The Secretary of Commerce will also take into account whether the nation participates in existing certification programs, such as that authorized under section 609 of Public Law 101-162, or the affirmative finding process under the International Dolphin Conservation Program Act (111 Stat. 1122). Nothing in this rulemaking will modify such existing certification procedures.

The Secretary of Commerce will publish certification determinations in the biennial report to the Congress. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the negatively-certified nations and provide them an opportunity to take corrective action with respect to the bycatch of PLMRs described in the biennial report to Congress.

Effect of Certification Determinations

If nations identified as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs receive a positive certification from the Secretary of Commerce pursuant to the Moratorium Protection Act, no actions will be taken against such nations.

If an identified nation fails to take sufficient action to address IUU fishing and/or bycatch of PLMRs and does not receive a positive certification from the Secretary of Commerce, the nation could face denial of port privileges for its fishing vessels, prohibitions on the import of certain fish and fish products into the United States, and other appropriate measures. In determining the appropriate course of action to recommend to the President, the Secretary of Commerce and other Federal agencies, as appropriate, will take into account the nature, circumstances, extent, duration, and gravity of the fishing activity for which the initial identification was made; the degree of culpability; any history of prior IUU fishing activities or bycatch of PLMRs; and other relevant matters. The Secretary of Commerce, in

cooperation with the Secretary of State, may initiate further consultations with identified nations that fail to receive a positive certification prior to determining an appropriate course of action.

The Secretary of Commerce will recommend to the President appropriate measures, including trade restrictive measures, to be taken against identified nations that have not received a positive certification, to address the relevant IUU fishing activity and/or fishing activities or practices that result in PLMR bycatch for which such nations were identified in the biennial report. The Secretary will make such recommendations on a case by case basis in accordance with international obligations, including the WTO Agreement. Adoption of trade measures will be done in a fair, transparent, and non-discriminatory manner. If certain fish or fish products of a nation are subject to import prohibitions, to facilitate enforcement, NMFS may require that other fish or fish products from that nation that are not subject to the import prohibitions be accompanied by documentation of admissibility to be developed by NMFS. If NMFS decides to require that such fish or fish products be accompanied by documentation of admissibility, it will develop this documentation through a future rulemaking action and give the public an opportunity to review and provide comment.

* * * *

b. Sea turtle conservation and shrimp imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On April 22, 2011, the Department of State made its annual certifications related to conservation of sea turtles. As excerpted below, the Federal Register notice announcing the State Department's April 22 certifications explained the Department's determinations and the applicable legal framework. 76 Fed. Reg. 32,010 (June 2, 2011).

* * * *

Section 609 of Public Law 101-162 ("Section 609") prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) that the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State ("the Department"). Revised State Department guidelines for making the required certifications were published in the Federal Register on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On April 22, 2011, the Department certified 12 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Colombia, Ecuador, El

Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Nigeria, Pakistan, Panama, and Suriname.

The Department also certified 26 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Ten nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The 10 nations and one economy are: the Bahamas, Belize, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka, and Venezuela.

The Department certified Belize this year on a different basis than last year. Effective December 31, 2010, the Government of Belize passed a law banning all forms of trawling in its waters, including its exclusive economic zone. The ban remains in effect. As a result, the Department has certified Belize as a nation whose fishing environment does not pose a threat of the incidental taking of sea turtles.

On April 22, 2011, the Department decertified Madagascar. In the absence of a legitimate constitutional government in Madagascar since the 2009 coup d'état, relations between the United States and the de-facto Malagasy authorities have been extremely limited. The Department of State and NOAA have been unable to conduct a Government of Madagascar sea turtle protection program verification visit since September 2008. Without the ability to independently verify whether Madagascar has a sea turtle protection program comparable to that of the United States, the Department is unable to certify Madagascar this year.

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3. Biodiversity Beyond National Jurisdiction

The fourth meeting of the UN General Assembly's informal working group on marine biodiversity in areas beyond national jurisdiction took place May 31 to June 3, 2011 in New York. As in past years, the major topics of discussion included environmental impact assessments, marine protected areas, and marine genetic resources. The working group adopted recommendations that were transmitted to the UN General Assembly for endorsement in its resolution on oceans and law of the sea, adopted December 24, 2011. U.N. Doc. A/RES/66/231.

The U.S. opening statement at the meeting reiterated the U.S. positions expressed at past meetings of the working group. See *Digest 2010* at 557-58. Specifically, the U.S. opening statement explained U.S. support for the use of environmental impact assessments for planned activities that may cause substantial pollution of or significant and harmful changes to the marine environment in areas within and beyond national jurisdiction. The U.S. opening statement expressed support for using marine protected areas that are based on the best available science and for which implementation, compliance, and enforcement

measures are “consistent with customary international law as reflected in the Law of the Sea Convention.” In addition, the U.S. opening statement highlighted “the need and opportunity to strengthen implementation of our commitments to conserve and sustainably use high seas living marine resources,” and reiterated the following U.S. position:

While some have called for a new international regime regarding marine genetic resources in areas beyond national jurisdiction, we continue to believe this is unnecessary and undesirable. As we have stated in prior meetings, we do not support the development of a regime for benefit-sharing for the products derived from marine genetic resources found in areas beyond national jurisdiction.

First, customary international law as reflected in the Law of the Sea Convention provides the framework under which all activities in the ocean are to be governed. The use and protection of living resources in areas beyond national jurisdiction fall under the high seas regime of the Law of the Sea Convention (part VII). As we are all aware, there are key provisions in the Convention regarding the conservation and management of living resources found in the high seas.

Second, we do not believe that a new legal regime regarding benefit sharing for marine genetic resources in areas beyond national jurisdiction would lead to greater conservation or sustainable use of marine biodiversity. On the contrary, we are concerned that such a regime would impede invaluable research and development. The greatest benefits to humanity from marine genetic resources will come from the worldwide availability of the products stemming from these living resources, and the contributions those products make in fundamental areas such as better public health, improved agricultural processes, and new scientific knowledge. Furthermore, development of products derived from marine genetic resources has proven to be an expensive, risky, complex, and lengthy undertaking, and one that results not simply from collecting the organism, but rather from years of research, innovation, investment, and ingenuity. Therefore, we do not support the development of a benefit-sharing regime for products made from marine genetic resources obtained from areas beyond national jurisdiction, but we of course do support appropriate conservation and sustainable use of these resources.

C. OTHER CONSERVATION ISSUES

On October 18, 2011, Steven Hill, Counselor to the U.S. Mission to the UN, delivered a statement in the General Assembly’s Sixth Committee on the International Law Commission’s (“ILC” or “Commission”) work on transboundary aquifers. The ILC completed draft articles on transboundary aquifers at its sixtieth session in 2008, and the UN General Assembly took note of them in the resolution it adopted on the law of transboundary aquifers on December 11, 2008. U.N. Doc. A/RES/63/124. Mr. Hill’s statement reiterated the U.S. view that the draft articles are a useful tool that states might use in negotiating bilateral or regional arrangements but that incorporating the draft articles into a

multilateral treaty would not be appropriate. The U.S. statement, excerpted below, is available at <http://usun.state.gov/briefing/statements/2011/177343.htm>.

* * * *

The United States continues to believe that the International Law Commission's work on transboundary aquifers has constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations. For all states, and especially those struggling to cope with pressures on transboundary aquifers, the Commission's effort to develop a set of flexible tools for using and protecting these aquifers has been a very useful contribution.

With respect to next steps, there is still much to learn about transboundary aquifers in general, and specific aquifer conditions and state practices vary widely. Moreover, many aspects of the draft articles clearly go beyond current law and practice. For these reasons, the United States continues to believe that context-specific arrangements provide the best way to address pressures on transboundary groundwaters in aquifers, as opposed to a global framework treaty. States concerned should take into account the provisions of these draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers.

Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. These factors will vary in each particular set of circumstances, and maintaining the articles as a resource in draft form seems to us the best way of ensuring that the draft articles will be a useful resource for States in all circumstances.

If the draft articles were fashioned into a global convention, we remain unconvinced that it would garner sufficient support. We also note that the draft articles seem to cover some waters that are already within the scope of the 1997 Watercourses Convention, such that the existence of two overlapping framework conventions could lead to confusion.

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Cross References

Human rights and climate change, **Chapter 6.G.**

Immunity from attachment of multinational research satellite, **Chapter 10.A.2.a.(1)**

EU's Emissions Trading Scheme, **Chapter 11.A.2.**

World Trade Organization (Dolphin/Tuna Dispute), **Chapter 11.C.1.**

Environmental obligations in trade promotion agreement, **Chapter 11.D.4.**

Chapter 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2011, the United States took steps to protect the cultural property of Italy, Colombia, and Bolivia by extending import restrictions on certain archaeological and ethnological material from those countries. These actions were based on determinations by the Department of State's Bureau of Educational and Cultural Affairs, finding that the cultural heritage of those countries "continue[d] to be in jeopardy from pillage of archaeological materials." Also in 2011, a new cultural property protection agreement between the United States and the Hellenic Republic (Greece) entered into force. The United States extended and entered into these agreements pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983 and pursuant to the Convention on Cultural Property Implementation Act, which implements parts of the Convention. See Pub. L. No. 97-446, 96 Stat. 2350, 19 U.S.C. §§ 2601–2613 ("the Act"). If the requirements of 19 U.S.C. § 2602 are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 and 2604.

Also in 2011, the United States Department of State responded to Freedom of Information Act ("FOIA") claims asserted in the U.S. Court of Appeals for the District of Columbia Circuit relating to its practices under the Act.

1. Italy

In 2011, the United States acted to continue to protect Italy's cultural heritage. Effective January 19, 2011, the United States and Italy amended and extended for five years the Memorandum of Understanding ("MOU") Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy. The amendments replaced and updated Article II of the MOU, which sets forth measures (in addition to the import restrictions) for each government to take during the term of the MOU. The original MOU entered into force on January 19, 2001, and the two countries extended it for the first time on January 19, 2006. See 66 Fed. Reg. 7399 (Jan. 23, 2001); 71 Fed. Reg. 3000 (Jan. 19, 2006); see also *Digest 2001* at 769-72 and *Digest 2006* at 901. The text of the amended MOU and related documents are available at <http://exchanges.state.gov/heritage/culprop/itfact.html>.

Also on January 19, 2011, the Department of Homeland Security, U.S. Customs and Border Protection (“CBP”), and the Department of the Treasury issued a notice in the Federal Register extending the import restrictions imposed previously with respect to Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods and amending the restrictions to include coins of Italian types under the metals category. 76 Fed. Reg. 3012 (Jan. 19, 2011).

2. Colombia

Effective March 15, 2011, the United States and Colombia extended for five years their Memorandum of Understanding (“MOU”), signed in 2006, concerning the imposition of import restrictions on certain categories of pre-Columbian archaeological artifacts and ecclesiastical ethnological materials originating in Colombia. See *Digest 2006* at 897-99 for background on the original MOU. The text of the MOU and the diplomatic notes exchanged on March 1, 2011 to extend the MOU are available at

<http://exchanges.state.gov/heritage/culprop/cofact.html>.

Also on March 15, the Department of Homeland Security, CBP, and the Department of the Treasury extended the import restrictions imposed previously with respect to certain archaeological and ethnological materials from Colombia. 76 Fed. Reg. 13,879 (Mar. 15, 2011).

3. Greece

On July 17, 2011, the United States signed with Greece an MOU concerning the imposition of import restrictions on certain archaeological and ethnological material from the Upper Paleolithic Period through the 15th Century A.D. of the Hellenic Republic, having first made the requisite statutory determination under section 303 of the Convention on Cultural Property Implementation Act.

The MOU entered into force with an exchange of diplomatic notes on November 21, 2011. Following entry into force, the Department of Homeland Security, CBP, and the Department of the Treasury published in the Federal Register a Designated List of restricted archaeological material representing the Upper Paleolithic Period (beginning approximately 20,000 B.C.) through the 15th century A.D., and ecclesiastical ethnological material representing Greece’s Byzantine culture (approximately the 4th century through the 15th century A.D.). 76 Fed. Reg. 74,691 (Dec. 1, 2011). A December 6, 2011 State Department media note explained that the MOU:

will strengthen and enhance collaboration to reduce looting and trafficking of antiquities, and provide for their return to Greece. It also aims to further the international interchange of such materials for cultural, educational, and scientific purposes. The agreement builds on the United States’ long-term commitment to cultural preservation and is consistent with a recommendation of the Cultural Property

Advisory Committee, administered by the U.S. Department of State's Bureau of Educational and Cultural Affairs.

www.state.gov/r/pa/prs/ps/2011/12/178328.htm. Further information about the MOU, including a link to its text, is available at <http://exchanges.state.gov/heritage/culprop/listactions/greece.html>.

4. Bolivia

Effective December 4, 2011, the United States and Bolivia extended their existing MOU concerning the imposition of import restrictions on certain archaeological objects and ethnological materials. See December 12, 2011 Media Note, available at www.state.gov/r/pa/prs/ps/2011/12/178618.htm. The original MOU that provided the basis for the import restrictions was concluded in 2001. See *Digest 2001* at 772-74. The United States and Bolivia previously extended the MOU in 2006. See *Digest 2006* at 901. Under the newly extended MOU, the United States will continue the existing import restrictions until December 4, 2016. The text of the amended MOU and related documents are available at <http://exchanges.state.gov/heritage/culprop/blfact.html>.

On December 1, 2011 the Department of Homeland Security, CBP, and the Department of the Treasury published a notice in the extending the import restrictions imposed previously with respect to certain categories of archaeological and ethnological materials from Bolivia, effective December 4, 2011. 76 Fed. Reg. 74,690 (Dec. 1, 2011).

5. Court of Appeals Decision in *Ancient Coin Collectors Guild v. U.S. Department of State*

On April 15, 2011, the United States Court of Appeals for the District of Columbia Circuit issued its decision in a case involving FOIA claims brought by the Ancient Coin Collectors Guild against the United States Department of State. *Ancient Coin Collectors Guild v. U.S. Dept. of State*, 641 F.3d 504 (D.C. Cir. 2011). The introduction to the court's opinion is set forth below, summarizing the claims and the court's conclusions. The court found that the United States had properly invoked FOIA exemptions for the most part, but remanded to the district court for consideration of claims as to one document withheld and as to the adequacy of the Department's overall search. On June 10, 2011, the Court of Appeals for the D.C. Circuit denied a petition for panel rehearing in the case. After remand, the United States government renewed its motion for summary judgment.*

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* Editor's note: On May 25, 2012, the district court granted the U.S. government's renewed motion for summary judgment.

The Convention on Cultural Property Implementation Act (“CPIA”), 19 U.S.C. §§ 2600-13, allows the President to enter into agreements to restrict importation of cultural artifacts pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. 823 U.N.T.S. 231 (1972).

The Cultural Property Advisory Committee (“CPAC”) is a federal advisory committee (within the meaning of the Federal Advisory Committee Act (“FACA”), Public Law 92-463, 5 U.S.C. App. 2). It advises the State Department’s [Assistant Secretary] for Educational and Cultural Affairs on import restriction requests from foreign governments. 19 U.S.C. § 2605. CPAC has no final authority to approve or deny import restrictions. But when the Department’s Bureau of Educational and Cultural Affairs enters into a Memorandum of Understanding with a foreign country on import restrictions, it must file a report with Congress that indicates how and why the import restrictions differ from CPAC’s recommendations. 19 U.S.C. § 2602(g)(2).

This case concerns eight requests filed under the Freedom of Information Act (“FOIA”) by the Ancient Coin Collectors Guild, the International Association of Professional Numismatists, and the Professional Numismatists Guild, Inc. (collectively, the “Guilds”) seeking records from the State Department relating to import restrictions imposed on cultural artifacts from China, Italy, and Cyprus. In response, State released 70 documents in full and 39 documents in part and withheld 19 documents entirely under various FOIA exemptions. Supplemental Declaration of Margaret P. Grafeld, Joint Appendix (“J.A.”) 229. The Guilds filed suit challenging the withholding of certain of these documents pursuant to FOIA Exemptions 1, 3, and 5 (as well as certain other exemptions not contested in this appeal), and the adequacy of State’s search in response to the FOIA requests. See 5 U.S.C. § 552(b)(1), (3), (5). The district court granted summary judgment in favor of State on all claims. *Ancient Coin Collectors Guild v. U.S. Dep’t. of State*, 673 F. Supp. 2d 1 (D.D.C. 2009).

We find that State’s invocation of Exemptions 1 and 5 was proper, as was part of its withholding under Exemption 3, but we reverse and remand the district court’s dismissal of the Guilds’ claims as to one document withheld under Exemption 3 and (in part) as to the adequacy of the search.

* * * *

B. PRESERVATION OF AMERICA’S HERITAGE ABROAD

The Commission for the Preservation of America’s Heritage Abroad (“the Commission”) is an independent agency of the U.S. government established in 1985 by § 1303 of Public Law 99-83, 99 Stat. 190, 16 U.S.C. § 469j (1985). Among other things, the Commission negotiates bilateral agreements with foreign governments to protect and preserve cultural heritage. For additional background, see *II Cumulative Digest 1991–1999* at 1793–94. On December 14, 2011, Secretary of State Hillary Rodham Clinton and Kosovo’s President Atifete Jahjaga signed the U.S.-Kosovo Agreement on the Protection and Preservation of Certain Cultural Properties. The U.S.-Kosovo Agreement entered into force upon signature. The agreement is available at heritageabroad.gov/Countries/Kosovo.aspx. Secretary Clinton’s remarks on

the signing are excerpted below and available in full at
www.state.gov/secretary/rm/2011/12/178863.htm.

* * * *

... This agreement we are about to sign commits our two governments to the protection and preservation, without discrimination, of the cultural heritage sites of national, religious, and ethnic groups that were victims of genocide during World War II.

Now, we know from experience that measures like these work. This will be the United States' 24th such cultural preservation agreement, and in countries from Estonia to Italy, we have seen real results. Forty years ago, the United States was the first nation in the world to ratify the World Heritage Convention, and we are proud that we have continued that work over the years. And our commitment is to the preservation of all of Kosovo's cultural heritage: Christian, Muslim, Jewish, Serb, Albanian, you name it. We are committed to helping you preserve it.

I saw firsthand one of the most cherished cultural treasures, the Gračanica Monastery, a Serbian Orthodox site that dates back to the 14th century, but it's just one of many such sites. And it's essential that as Kosovo forges a pluralistic society, a nation that guarantees citizenship rights, equal rights to all of its people, that all of these sites be preserved for the people in Kosovo and the Balkans, as well as others throughout the world who share that same heritage.

So this is another step on the road to a thriving, independent, multiethnic Kosovo, where democratic institutions are strong and opportunities are abundant, and where I think the president has set exactly the right tone by painting a vision of what Kosovo can become.

* * * *

C. IMMUNITY OF ART AND OTHER CULTURAL OBJECTS FROM JUDICIAL SEIZURE

On June 15, 2011, the United States filed a statement of interest in the U.S. District Court for the District of Columbia in a case brought by Agudas Chasidei Chabad, a New York-based religious organization, against the Russian Federation and several Russian government entities seeking the return of a collection of books and manuscripts of cultural significance. *Chabad v. Russian Federation, et al.*, No. 05-cv-1548 (D.C. Dist. 2011). Chabad obtained a default judgment in 2010 ordering the defendants to surrender the collection and sought court orders permitting enforcement of the judgment through attachment and execution. The United States filed the statement of interest to address the operation and relevance of the Immunity from Seizure Act, 22 U.S.C. § 2459. The U.S. statement of interest is excerpted below (with footnotes omitted) and available at www.state.gov/s/l/c8183.htm. The district court's opinion and order authorizing enforcement through attachment and execution specified that property covered by 22 U.S.C. §2459 would be exempt from attachment. *Chabad v. Russian Federation*, 798 F.Supp.2d 260, 271-72 (D.C. Dist. 2011).

* * * *

A. The United States Has an Interest in the Application of § 2459

Congress passed § 2459 in 1965 to “provide a process to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and to provide machinery to achieve this objective.” H.R. Rep. No. 89-1070, at 3577 (1965). The statute states, in relevant part:

Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

22 U.S.C. § 2459(a).

To obtain immunity for imported cultural objects under § 2459, the United States borrowing institution must first submit an application to the Department of State. That application must include, among other components, a list of the imported objects to be covered, a copy of the agreement with the foreign owner or custodian, a list of expected places and dates of exhibition in the United States, and a statement explaining the cultural significance of the imported objects. See Check List for Applicants, U.S. DEPT. OF STATE, <http://www.state.gov/s/1/3196.htm> (last visited June 9, 2011). The Department of State must then make determinations as to whether the objects are of cultural significance and whether their temporary exhibition in the United States is in the national interest. If the Department of State makes favorable determinations regarding those questions and publishes a notice to that effect in the Federal Register prior to importation, those cultural objects are immune from any judicial process that would interfere with the borrower’s custody or control. 22 U.S.C. § 2459(a).

Section 2459 was enacted in large part to address certain foreign policy objectives. Chief among those objectives was the goal to facilitate cultural exchanges as a means to foster international cooperation. See H.R. Rep. No. 89-1070, at 3578 (1965). Standing in the way of such exchanges at the time of § 2459’s enactment was the threat that foreign cultural objects would be seized while on loan to the United States. Indeed, when the legislation was under consideration, an exchange was pending between a Soviet museum and the University of Richmond, and the Government of the Soviet Union insisted on statutory immunity from seizure as a condition for the loan. ... Since then, as indicated by a search of the Westlaw Federal Register Database, well over one thousand § 2459 immunity notices have been published, many of which cover foreign state-owned cultural objects. Implementation of the § 2459 program,

thus, has played an important role in conducting public diplomacy and facilitating exchanges of cultural objects with foreign lenders, including foreign states and their political subdivisions.

The United States is concerned that a broad, unqualified attachment order in this or any other proceeding could be used in an attempt to seize immune property, including cultural objects protected by § 2459. If issued, Plaintiff's proposed order would fail to alert other courts or enforcement authorities to the potential immunities applicable to Defendants' property. The United States has an interest in the courts' determining the immunities of particular property—whether pursuant to § 2459 or to other relevant statutes, such as the enforcement provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1609—that has been targeted by Plaintiff before issuing a writ of attachment or execution.

More specifically, this dispute has raised the precise concerns that § 2459 was designed to alleviate. ...[A]fter the Court's July 2010 entry of judgment on the default, the Russian Federation imposed a moratorium on all loans of Russian cultural treasures to exhibitors in the United States. This moratorium also included a recall of art already on temporary display in the United States that had received immunity protection under § 2459. See, e.g., *Culturally Significant Objects Imported for Exhibition Determinations: "Treasures of Moscow: Icons From the Andrey Rublev Museum,"* 75 Fed. Reg. 53012-03 (Aug. 30, 2010).

Section 2459 was passed in an effort to avoid this kind of international friction. The drafters recognized that cultural exchange promotes mutual understanding and strengthens ties between peoples, and that without assurances against seizure, many of those exchanges would not take place. See H.R. Rep. No. 89-1070, at 3578-79 (1965). It is, therefore, in the interest of the United States that any order authorizing attachment and execution makes clear that it cannot be used in an attempt to seize Russian cultural objects protected by § 2459.

Since becoming aware of the United States' concerns regarding the integrity of § 2459, Plaintiff has filed two documents in an effort to allay those concerns. As explained above, both documents disclaim any intention to attach or execute upon Russian cultural objects that are immune from judicial process under § 2459. The United States appreciates Plaintiff's efforts to make its intentions clear, and understands its filings to acknowledge that imported cultural objects on temporary loan to U.S. institutions are immune from judicial seizure when the Department of State has published in the Federal Register its determinations of cultural significance and national interest.

B. The United States Supports the Transfer of the Collection to Chabad

The United States wishes to make clear that this Statement of Interest is only intended to advise the Court of the United States' interest in the efficacy and integrity of § 2459, and is in no way intended to signal any change in its consistent position that the Collection should be transferred to Chabad. Since the early 1990s, the Executive Branch has made extensive diplomatic efforts to help Chabad gain possession of those materials. See *The Schneerson Collection and Historical Justice: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong., 1st Sess. 6 (2005). The United States has raised the issue at the Presidential level under administrations of both major U.S. parties, and in cabinet, Ambassadorial, and working-level diplomatic discussions. *Id.* In addition, there have been several congressional letters written to the President of the Russian Federation on Chabad's behalf, strongly urging that the Collection be surrendered to Chabad. *Id.* at 13. The United States has not deviated from this position and continues to support Chabad's efforts to recover the Collection.

* * * *

Cross References

Claim for compensation for seized art (Cassirer), **Chapter 8, Chapter 10.A.2.b.**

Immunity from seizure of art owned by Iran, **Chapter 10.A.3.b.(2)**

Chapter 15

Private International Law

A. COMMERCIAL LAW: UNCITRAL

1. Review of Work

On October 10, 2011, John Arbogast, Counselor to the United States Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee during its debate on the report of the UN Commission on International Trade Law ("UNCITRAL") on the work of its forty-fourth session. See U.N. Doc. A/66/17. Mr. Arbogast's statement, excerpted below, is available at <http://usun.state.gov/briefing/statements/2011/185206.htm>.

* * * *

...The United States remains a strong supporter of UNCITRAL, its programs and work achievements, and commends the Secretariat for its continued hard work, its focus on technical and complex economic and commerce issues, and its attention to the concerns of States at all levels of economic development and in all regions.

The 44th Session was highly productive. Working efficiently on the basis of substantial preparatory efforts by Working Groups I and V, the Commission adopted two final texts.

We are pleased to favorably note the adoption of the revised UNCITRAL Model Law on Public Procurement, which updates and expands upon the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The revised Model Law will be extremely valuable to countries seeking to modernize their government procurement systems, and we note that its use has been supported by a number of international financial institutions. The Working Group is preparing a Guide to Enactment that will assist them, and we look forward to its early completion.

We also favorably note the adoption of the "judicial deskbook" collating prior completed work of the Commission in the economically important area of corporate insolvency matters, especially involving cross-border trade and commerce. This compilation makes the Commission's work readily accessible to officials and practitioners worldwide. We note in this regard that the United States has adopted the UNCITRAL Model Law on cross-border insolvency cases as a new chapter of the US Bankruptcy Code, and we recommend that other States consider such action so as to limit existing cross-border risk.

The Commission's report describes important progress in the area of investor-State arbitration in Working Group II; consideration of possible new instruments on on-line dispute resolution in Working Group III; new work initiated on managing cross-border insolvency cases as well as liabilities of corporate officers and directors in Working Group V, and continuing progress in Working Group VI in developing a registration system to implement the UNCITRAL Model Law on secured transactions. Moreover, authorization was granted for a reactivated Working Group IV to begin work on electronic transferability of rights. We are pleased to

support all these activities, as they have great potential to promote commerce, trade and the rule of law throughout the regions of the world.

* * * *

2. UN General Assembly Resolutions

On December 9, 2011, the United States joined consensus in the Sixth Committee in adopting two resolutions relating to UNCITRAL's work. The first resolution recommended that all States use the new Model Law on Public Procurement to assess their legal regimes and enact or revise their laws. U.N. Doc. A/RES/66/95. The new Model Law on Public Procurement incorporated revisions to the 1994 Model Law on Procurement of Goods, Construction and Services. The UNCITRAL Model Law on Public Procurement is available at www.cnudci.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html. The second resolution, concerning the completion of a resource called "UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective," recommended that this new product "be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings." U.N. Doc. A/RES/66/96. The UNCITRAL Model Law on Cross-border Insolvency: the Judicial Perspective is available at www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf.

B. INTERNATIONAL CIVIL LITIGATION

1. *Forum Non Conveniens* Dismissal of Suit to Enforce Arbitral Award

As discussed in Chapter 10.A.2.c., in February 2011, the United States submitted an *amicus* brief in the U.S. Court of Appeals for the Second Circuit after the district court's denial of a motion to dismiss a case against the Republic of Peru and one of its ministries. *Figueiredo v. Peru*, No. 10-0214(CON) (2d. Cir. 2011). In addition to the section on the Foreign Sovereign Immunities Act (FSIA) discussed in Chapter 10, the U.S. brief also contained a section arguing that the district court had properly denied the motion to dismiss on *forum non conveniens* grounds. Excerpts from the discussion on *forum non conveniens* follow (with footnotes and citations to the record omitted). The brief is available in full at www.state.gov/s/l/c8183.htm. On December 14, 2011, the U.S. Court of Appeals for the Second Circuit decided the appeal, reversing the district court's denial of the motion to dismiss on *forum non conveniens* grounds. *Figueiredo v. Peru*, 665 F.3d 384 (2d Cir. 2011).

* * * *

The district court correctly held that *forum non conveniens* is an available ground for dismissal in proceedings brought pursuant to the Panama Convention. ...

Article 4 of the Panama Convention provides that "execution and enforcement" under the Convention should occur "in accordance with the procedural laws of the country where it is to be

executed.” Panama Convention Art 4. As the Supreme Court has explained, the doctrine of *forum non conveniens* is among the “procedural laws” of general applicability in the United States. *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (*forum non conveniens* is “procedural rather than substantive”). *Forum non conveniens* is therefore properly considered pursuant to Article 4 of the Convention.

Under the governing standard, in considering whether dismissal on *forum non conveniens* grounds is appropriate, “a court determines the degree of deference properly accorded the plaintiff’s choice of forum” and “whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute,” and then “balances the private and public interests implicated in the choice of forum.” *Norex Petroleum Ltd. v. Access Indus.*, 416 F.3d 146, 153 (2d Cir. 2005). In the United States’ view, the determinative consideration in this case, and one that implicates U.S. policy interests, is the balancing of the public and private interest factors. Even assuming the availability of another adequate forum and that Figueiredo’s choice of forum should get little if any weight, the public policy interest in favor of enforcing arbitral awards under the Panama Convention weighs heavily against dismissal here.

B. Public Interest Factors

* * * *

The United States has a significant interest in allowing U.S. courts to enforce international arbitration awards pursuant to the Panama Convention, as the district court recognized. Accordingly, the public interest factors will generally weigh against *forum non conveniens* dismissal and the doctrine should only be employed to dismiss an action if compelling countervailing interests are present. In recommending ratification of the Panama Convention, the Deputy Secretary of State observed that “[a]rbitration agreements have become an increasingly prevalent feature of international commercial transactions, as parties have sought the advantages of efficiency and flexibility which arbitration can provide.” S. Treaty Doc. No. 97-12, at 3 (1981). The State Department also determined that “[t]he recognition and enforcement of international arbitration agreements and awards by national courts, as provided for in this Convention, is necessary to support this development.” *Id.*; see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting that the New York Convention evinces a “strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes”).

If on remand the district court here finds that there is subject matter jurisdiction over Figueiredo’s claims against Peru and the Ministry, the presence of Peru’s assets in New York provides strong support for the district court’s decision not to grant dismissal under the doctrine of *forum non conveniens*. A purpose of the Panama Convention was not only to permit “recognition” of foreign arbitration awards, but also to facilitate “execution” of such awards “in the same manner as that of decisions handed down by national or foreign ordinary courts.” Panama Convention, Art. 4. Congress implemented this provision by directing that foreign arbitration awards “shall . . . be recognized *and enforced* under” the Federal Arbitration Act. 9 U.S.C. § 304 (emphasis added); cf. 28 U.S.C. § 1606 (where an exception to foreign sovereign immunity exists, a foreign state “shall be liable in the same manner and to the same extent as a private individual under like circumstances”). Congress’s evident intent was thus to permit those with foreign arbitration awards to enforce those awards against assets that may be within the jurisdiction of United States courts. Indeed, the very point of registering and enforcing an

arbitration award in a foreign forum is to satisfy the award with the debtor's assets located in the forum.

On the other hand, this Court has held that considerations of international comity are relevant to the weighing of public interest factors in *forum non conveniens* analysis. *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 983 (2d Cir. 1993). Accordingly, another relevant public interest factor may therefore be the Peruvian three-percent cap law, which Peru argues provides an independent basis to dismiss this action. In this case, however, considerations of international comity should not carry much weight in the *forum non conveniens* balancing because, as described in more detail below, Peru's comity argument is undermined by the lack of demonstrated direct conflict between Peruvian law and these confirmation and enforcement proceedings.*

Other relevant public interest factors include "administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law." *Monde Re*, 311 F.3d at 500 (citing *Gilbert*, 330 U.S. at 508-09). These factors do not weigh strongly against adjudication in this case. The district court did not raise any concerns of court congestion, and FSIA litigation is conducted without a jury. 28 U.S.C. § 1330(a). Any interest Peru had in adjudicating this matter in Peru is outweighed by the United States' interest in enforcing arbitration awards and the presence of Peruvian assets in New York. And while the district court may have to consider some aspects of Peruvian law in determining the Program's status, that is not uncommon in FSIA litigation. Moreover, U.S. law, not Peruvian law, controls whether to enforce the arbitration agreement.

C. Private Interest Factors

The "private interest" factors that a court should consider in a *forum non conveniens* analysis include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make a trial of a case easy, expeditious and inexpensive." *Monde Re*, 311 F.3d at 500.

The record in this case already contains evidence from Peru's expert concerning the Program's status. Although, as described above, the district court's assessment of subject matter jurisdiction may require additional evidence and fact finding, the challenges faced by the parties in presenting such evidence do not generally weigh in favor of dismissal on *forum non conveniens* grounds. U.S. courts have routinely considered the same jurisdictional question presented here, *i.e.*, whether governmental entities are agencies or instrumentalities of a foreign state, based on evidence submitted by the parties. *See, e.g., Garb*, 440 F.3d at 591; *Noga*, 361 F.3d at 684-90. Where "extensive discovery" and a probable "trial of the factual issues implicating and establishing" the liability of a nonsigner to an arbitration agreement are necessary, the private interest factors may be substantial. *Monde Re*, 311 F.3d at 500. But even then, those considerations would have to be weighed against the strong public interest in enforcing international arbitration agreements under an applicable treaty, especially where the debtor has assets in the forum in which registration and enforcement is sought.

* Editor's note: See discussion in Section B.4. *infra* of the portion of the United States brief addressing comity.

In this case, there is no indication that the burden on the parties to present evidence regarding the legal relationship between the Program and Peru and the Ministry will be so extensive as to conclude that the district court abused its discretion in denying *forum non conveniens* dismissal.

* * * *

2. Removal from State Court of Case Related to an Arbitration

On February 7, 2011 in the case *Infuturia Global Ltd. v. Sequus Pharmaceuticals, Inc.*, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision that the case had properly been removed from state court because it was related to an arbitration award. 631 F.3d 1133 (9th Cir. 2011). The case arose out of a dispute over a license agreement between Infuturia, a citizen of the British Virgin Islands, and Yisum, a citizen of Israel. Infuturia sued a third-party, Sequus, a citizen of California, in California state court alleging that Sequus had tortiously interfered with the license agreement. Yisum was not a party to the state court case, but successfully obtained a stay in that case pending an arbitration under the license agreement in Israel. After the arbitration concluded, the state court lifted the stay and the case was removed to federal court pursuant to 9 U.S.C. § 205 of the Federal Arbitration Act, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). Infuturia argued that removal was improper. In federal district court, Sequus raised collateral estoppel as an affirmative defense, arguing that the issues had been resolved in the arbitration in Israel. Excerpts below from the court's decision discuss the basis for holding that the court properly exercised removal jurisdiction under the Federal Arbitration Act. (Footnotes have been omitted.)

* * * *

III. Removal Jurisdiction

We review *de novo* a district court's denial of a motion to remand for lack of removal jurisdiction. *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir.2007). We also review *de novo* questions of statutory interpretation. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir.2006).

Title 9 U.S.C. § 205 provides that federal courts have removal jurisdiction [w]here the subject matter of an action or proceeding pending in a State court *relates to* an arbitration agreement or award falling under the Convention.... The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

(emphasis added). When interpreting the meaning of this statute, we "look first to its plain language." *United States v. Juvenile Male*, 595 F.3d 885, 898 (9th Cir.2010) (citation and alteration omitted). The critical language here is the phrase "relates to." The Fifth Circuit, which

is the first and only circuit court to address the meaning of “relates to” in § 205, construed this language to mean that “whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit.” *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir.2002). We agree with this interpretation. The phrase “relates to” is plainly broad, and has been interpreted to convey sweeping removal jurisdiction in analogous statutes. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (holding that under § 514(a) of the Employee Retirement Income Security Act, “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan”); *McGuire v. United States*, 550 F.3d 903, 911–12 (9th Cir.2008) (holding that under the bankruptcy jurisdiction statute, 28 U.S.C. § 1334(b), “[a] civil proceeding is ‘related to’ a [bankruptcy] case if the outcome of the proceeding could *conceivably have any effect* on the estate being administered in bankruptcy” (emphasis added) (citation and internal quotation marks omitted)).

Nothing in § 205 urges a narrower construction. Indeed, the statute invites removal of cases whose relation to an agreement or award under the Convention is based on an affirmative defense by expressly abrogating the “well-pleaded complaint” rule. *See* 9 U.S.C. § 205 (“[T]he ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.”); *Beiser*, 284 F.3d at 669 (“[Federal courts] will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant’s assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of ‘relates to’.”).

Infuturia argues for a narrower interpretation of the statute by citing *AtGames Holdings Ltd. v. Radica Games, Ltd.*, 394 F.Supp.2d 1252 (C.D.Cal.2005). In *AtGames*, the district court held that “a state court action is [only] removable if (1) the parties to the action have entered into an arbitration agreement, and (2) the action relates to that agreement.” *Id.* at 1255. *AtGames* narrows the class of actions removable under § 205 by *adding* privity of contract to the prerequisites for removal jurisdiction. This holding finds no support in the language of the statute. While *AtGames* would hinge jurisdiction on the relatedness of the *parties*, § 205 focuses only on the relatedness of the “*subject matter* of [the] action ... to an arbitration agreement.” Further, although *AtGames* claims to be consistent with *Beiser*, nothing in *Beiser* suggests that only parties privy to an arbitration agreement or award falling under the Convention may seek removal under § 205. Rather, *Beiser* confers removal jurisdiction “whenever an arbitration agreement ... could *conceivably* affect the outcome of the plaintiff’s case....” 284 F.3d at 669. In a case such as this, where the defendant relies on the affirmative defense of collateral estoppel regarding issues already resolved against the plaintiff in arbitration, the arbitral award “could conceivably affect the outcome” of the case. *Id.*

We find *AtGames* unpersuasive and decline to add any prerequisites to removal jurisdiction not expressed in the language of the statute. Because Sequus raised an affirmative defense “relat[ing] to” the Infuturia–Yissum arbitral award (which neither party disputes “falls under” the Convention), the district court had removal jurisdiction under 9 U.S.C. § 205.

* * * *

3. Enforceability of Arbitration Clauses

On October 18, 2011, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's denial of a motion to compel arbitration. *Smallwood v. Allied Van Lines*, 660 F.3d 1115 (9th Cir. 2011). The Court of Appeals held that foreign arbitration clause in the contract at issue was unenforceable in light of the exception to arbitration created by Congress in the Carmack amendment. The case was brought by Mr. Smallwood after Allied Van Lines ("AVL") shipped certain of his property—including firearms and ammunitions—to the United Arab Emirates ("UAE") when he intended that property to be stored in the United States. This misdirection led to Smallwood's arrest and imprisonment in the UAE. AVL sought to compel arbitration under the foreign arbitration clause in the shipping contract. The interaction of the Carmack Amendment, 49 U.S.C. § 14706, with federal arbitration law is discussed in the opinion of the Court of Appeals, excerpted below with footnotes omitted.

* * * *

III. Discussion

AVL argues that the district court erred for either of two reasons: (1) the Carmack Amendment permits foreign arbitration clauses; or (2) the Federal Arbitration Act requires enforcement of the arbitration clause even if it conflicts with the Carmack Amendment. We reject both arguments.

A. The Carmack Amendment

The Carmack Amendment governs the terms of interstate shipment by domestic rail and motor carriers. *See [Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., 557 F.3d 985, 990 (9th Cir.2009), rev'd on other grounds, — U.S. —, 130 S.Ct. 2433, 177 L.Ed.2d 424 (2010)]*. Carmack was enacted in 1906 as an amendment to the Interstate Commerce Act. *See id.* It has since been amended repeatedly, but its purpose has always been "to relieve cargo owners 'of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.' " *Kawasaki*, 130 S.Ct. at 2441 (quoting *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950)). Part of the relief guaranteed to shippers was "the right of the shipper to sue the carrier in a convenient forum of the shipper's choice." *Aacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir.1976).

When interpreting Carmack:

Our analysis begins, as it must, with the text of the statute in question. *Azarte v. Ashcroft*, 394 F.3d 1278, 1285 (9th Cir.2005). Under the "plain meaning" rule, "[w]here the language [of a statute] is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir.2001) (en banc) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)). *Campbell v. Allied Van Lines Inc.*, 410 F.3d 618, 620–21 (9th Cir.2005) (alteration in original).

Carmack's statutory scheme is clearly intended to protect shippers from being forced to

submit to foreign arbitration as a condition of contracting with a carrier of household goods. To begin with, Carmack expressly prohibits carriers of household goods from contracting around the statute's requirements. *See* 49 U.S.C. § 14101(b)(1) ("A carrier providing transportation or service subject to jurisdiction under chapter 135 may enter into a contract with a shipper, other than for the movement of household goods described in section 13102(10)(A), to provide specified services under specified rates and conditions."). It is undisputed that AVL is a carrier of household goods and therefore prohibited from contracting around Carmack's conditions.

* * * *

AVL's foreign arbitration clause would allow AVL to compel Smallwood to arbitrate, probably in the UAE. We have held that "foreign arbitration clauses are but a subset of foreign forum selection clauses in general." *See Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1339 (9th Cir.1997) (internal quotation marks omitted). The parties' foreign arbitration clause plainly contravenes Carmack's directive that Smallwood have recourse in the enumerated venues unless he agrees to arbitrate elsewhere after the dispute arises.

AVL raises a final argument based on analogy to the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 30701. COGSA is a regulatory regime for ocean carriage akin to the Carmack regime for motor and rail carriage. The Supreme Court has held that COGSA permits foreign forum selection clauses, *see Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995), and we have extended that rule to foreign arbitration clauses, *see Fireman's Fund*, 131 F.3d at 1339. *Sky Reefer* and COGSA, however, are inapposite here. Whereas Carmack explicitly guarantees shippers certain venues to seek recourse against their carriers, COGSA only generally prohibits ocean carriers from using contracts "relieving [their] liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability." COGSA, § 3(8), 46 U.S.C. § 30701 note (quoted by *Sky Reefer*, 515 U.S. at 534, 115 S.Ct. 2322). *Sky Reefer* interpreted COGSA's prohibition on contracts lessening liability to apply only to the liability explicitly articulated in COGSA and not to extend to procedural issues affecting the shipper's ease of recovery. *See* 515 U.S. at 534–35, 115 S.Ct. 2322 (emphasizing the phrase "duties and obligations provided in this section"). Because Carmack expressly prohibits carriers of household goods from contracting around its venue provisions, and because Smallwood does not rely on a general prohibition on lessening carriers' liability, *Sky Reefer* and its interpretation of COGSA § 3(8) are inapposite to our interpretation of Carmack.

For the foregoing reasons we agree with the district court's interpretation of § 14706. Foreign arbitration clauses, except as provided in § 14708, are unenforceable under Carmack because they necessarily involve limiting shippers' choice of venues enumerated in the statute.

B. Federal Arbitration Law

AVL argues that our interpretation of Carmack conflicts with federal arbitration law. We have previously explained:

Federal arbitration law is codified in the three chapters of Title 9 of the United States Code. The Federal Arbitration Act ("FAA"), enacted in 1947, comprises the first chapter. *See* 9 U.S.C. §§ 1–14. The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," implementing the treaty of the same name, was enacted in 1970. This statute, commonly called the Convention Act, comprises the second chapter. *See* 9 U.S.C. §§ 201–

208. The third chapter, implementing the Inter American Convention on International Commercial Arbitration, is not relevant to this case. *See* 9 U.S.C. §§ 301–307.

Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1152–53 (9th Cir.2008). AVL cites both the FAA and the Convention Act. The Convention Act was “intended to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.” *Sky Reefer*, 515 U.S. at 538, 115 S.Ct. 2322 (internal quotation marks omitted). Indeed, “[i]t is well-settled that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’ ” *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 652 (9th Cir.2009) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). That preference, however, applies only if “there is no independent basis in law or equity for revocation.” *Sky Reefer*, 515 U.S. at 538–39, 115 S.Ct. 2322 (citing *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). “Like any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). “The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” *Id.* at 227, 107 S.Ct. 2332.

When Congress intends to create an exception to the FAA, “such an intent ‘will be deducible from [the statute’s] text or legislative history,’ or from an inherent conflict between arbitration and the statute’s underlying purposes.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)) (alteration in original and citations omitted). As we have explained, the plain text of Carmack prohibits household carriers from forcing a shipper to agree to arbitrate his claims as a condition to contracting. Thus, there is “a contrary congressional command” that overrides the FAA’s mandate to enforce arbitration agreements.

* * * *

Conclusion

The parties’ arbitration clause is unenforceable under 49 U.S.C. § 14706 because it contravenes a shipper’s right to select his forum after the dispute arises, and thus violates the plain language of the Carmack Amendment.

* * * *

4. International Comity

The U.S. brief filed in the Second Circuit in *Figueiredo* (discussed in Section 1 above) also contained an argument that principles of international comity did not require dismissal. The brief asserted that it was not an abuse of discretion to deny the motion to dismiss because dismissal on comity grounds is appropriate only when there is a true conflict between domestic and foreign law and Peru had presented no evidence of such a conflict. Moreover, the strong U.S. policy interests in promoting confirmation and enforcement of arbitral awards covered by treaties weighed against dismissal. The brief is available in full at www.state.gov/s/l/c8183.htm. The decision of the Second Circuit Court of Appeals

rendered in December 2011 was not based on comity. *Figueiredo v. Peru*, 665 F.3d 384 (2d Cir. 2011).

In *FG Hemisphere Associates*, discussed in Chapter 10.A.4., the United States argued based on principles of comity that contempt sanctions against a foreign government were improper in a case seeking to execute a judgment under the Foreign Sovereign Immunities Act ("FSIA"). *FG. Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). The U.S. Court of Appeals for the D.C. Circuit rejected the comity argument (footnotes omitted):

We turn to the government's and the DRC's comity arguments based on international practice and, as a separate although related matter, the government's foreign relations concerns. Although it may be true, as the government contends, that at least several countries have explicitly prohibited monetary sanctions against a foreign state for refusal to comply with a court order, that seems quite irrelevant because our Congress has not. And we should bear in mind that our discovery process is extraordinarily extensive compared to that of most foreign legal systems. See Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 652-53 (2d ed. 2003).

The government also suggests that we should be concerned about the consequences of affirming the district court's order given possible reciprocal treatment of the United States in foreign courts. Although we often give consideration to the government's assertion that a legal action involves sensitive diplomatic considerations, we only defer to these views if reasonably and specifically explained. See *Altmann*, 541 U.S. at 702. The government does not explain how the United States would be harmed if it were found in contempt under reciprocal circumstances. The broad, generic argument that the government offers here seems to us to be appropriately presented to Congress – not us. The government, moreover, did not present its foreign policy concerns to the district court. We do recognize that there could be circumstances in which particular pressing foreign policy concerns involving a defendant country could affect a court's decision, and those concerns, depending on their timing, could justify the government's presenting those matters first in an *amicus* brief in the court of appeals, but the government has not presented any such argument in this case.

5. Jurisdiction over foreign entities in U.S. courts

As discussed in *Digest 2010* at 611-19, the U.S. Supreme Court heard two cases in tandem in 2010 concerning state courts' jurisdiction over foreign manufacturers in products liability cases. The Supreme Court issued its opinions in both cases on June 27, 2011. *Goodyear Dunlop Tires Ops. v. Brown*, No. 10-76, 131 S.Ct. 2846 (2011); *J. McIntyre Machinery v. Nicastro*, No. 09-1343, 131 S.Ct. 2780 (2011).

In *McIntyre*, the Supreme Court held by a 6-3 majority that the New Jersey court improperly exercised jurisdiction over a foreign manufacturer in a case arising out of an accident that occurred in New Jersey involving that manufacturer's product. The majority, in two separate opinions, found that exercising jurisdiction would violate the Due Process

Clause of the Fourteenth Amendment of the Constitution because the foreign manufacturer never engaged in activity purposely directed at New Jersey. The dissenting opinion asserted that the nature of modern commerce, with products marketed nationwide and even worldwide, mitigated any unfairness of exercising jurisdiction over a foreign manufacturer in the state where its product caused an injury. The excerpt below from the plurality opinion explains the court's weighing of the foreign manufacturer's contacts with and activities in the state of New Jersey (with footnotes and references to the record in the case omitted).

* * * *

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. See *Asahi*, 480 U. S., at 113, n. Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey. See *Hanson*, 357 U. S., at 254 ("The issue is personal jurisdiction, not choice of law"). A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." These facts may reveal an intent to serve the U. S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

It is notable that the New Jersey Supreme Court appears to agree, for it could "not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." 201 N. J., at 61, 987 A. 2d, at 582. The court nonetheless held that petitioner could be sued in New Jersey based on a "stream-of-commerce theory of jurisdiction." *Ibid.* As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also cited "significant policy reasons" to justify its holding, including the State's "strong interest in protecting its citizens from defective products." *Id.*, at 75, 987 A. 2d, at 590. That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.

* * *

Due process protects petitioner's right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is
Reversed

* * * *

In *Goodyear*, the Court unanimously reversed the North Carolina court's assertion of jurisdiction over Goodyear's foreign subsidiaries in a case arising out of an accident that occurred in Paris involving Goodyear tires manufactured abroad. The facts of the case and the U.S. *amicus* brief supporting reversal are discussed in *Digest 2010* at 611-19. Excerpts below from the Supreme Court's opinion explain the error of the North Carolina courts in asserting general jurisdiction based on the notion of a product's placement into the "stream of commerce." Footnotes and citations to the state court's decision in the case have been omitted.

* * * *

To justify the exercise of general jurisdiction over petitioners, the North Carolina courts relied on the petitioners' placement of their tires in the "stream of commerce." The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting "jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer." 18 W. Fletcher, *Cyclopedia of the Law of Corporations* §8640.40, p. 133 (rev. ed. 2007). Typically, in such cases, a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum. ...

Many States have enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state. For example, the "Local Injury; Foreign Act" subsection of North Carolina's long-arm statute authorizes North Carolina courts to exercise personal jurisdiction in "any action claiming injury to person or property within this State arising out of [the defendant's] act or omission outside this State," if, "in addition[,] at or about the time of the injury," "[p]roducts . . . manufactured by the defendant were used or consumed, within this State in the ordinary course of trade." N. C. Gen. Stat. Ann. §1-75.4(4)(b) (Lexis 2009). As the North Carolina Court of Appeals recognized, this provision of the State's long-arm statute "does not apply to this case," for both the act alleged to have caused injury (the fabrication of the allegedly defective tire) and its impact (the accident) occurred outside the forum.

The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction. See, e.g., *World-Wide Volkswagen*, 444 U. S., at 297 (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit

in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*” (emphasis added)). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant. See, e.g., *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F. 2d 200, 203, n. 5 (CAD 1981) (defendants’ marketing arrangements, although “adequate to permit litigation of claims relating to [their] introduction of . . . wine into the United States stream of commerce, . . . would not be adequate to support general, ‘all purpose’ adjudicatory authority”).

A corporation’s “continuous activity of some sorts within a state,” *International Shoe* instructed, “is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.” 326 U. S., at 318. Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains “[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” *Donahue v. Far Eastern Air Transport Corp.*, 652 F. 2d 1032, 1037 (CAD 1981).

Sued in Ohio, the defendant in *Perkins* was a Philippine mining corporation that had ceased activities in the Philippines during World War II. To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: the corporation’s president maintained his office there, kept the company files in that office, and supervised from the Ohio office “the necessarily limited wartime activities of the company.” *Perkins*, 342

U. S., at 447–448. Although the claim-in-suit did not arise in Ohio, this Court ruled that it would not violate due process for Ohio to adjudicate the controversy. *Ibid.*; see *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770, 779–780, n. 11 (1984) (Ohio’s exercise of general jurisdiction was permissible in *Perkins* because “Ohio was the corporation’s principal, if temporary, place of business”).

We next addressed the exercise of general jurisdiction over an out-of-state corporation over three decades later, in *Helicopteros*. In that case, survivors of United States citizens who died in a helicopter crash in Peru instituted wrongful-death actions in a Texas state court against the owner and operator of the helicopter, a Colombian corporation. The Colombian corporation had no place of business in Texas and was not licensed to do business there. “Basically, [the company’s] contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise] for substantial sums; and sending personnel to [Texas] for training.” 466 U. S., at 416. These links to Texas, we determined, did not “constitute the kind of continuous and systematic general business contacts . . . found to exist in *Perkins*,” and were insufficient to support the exercise of jurisdiction over a claim that neither “ar[ose] out of . . . no[r] related to” the defendant’s activities in Texas. *Id.*, at 415–416 (internal quotation marks omitted).

Helicopteros concluded that “mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State’s assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Id.*, at 418. We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners’ tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.

But cf. *World-Wide Volkswagen*, 444 U. S., at 296 (every seller of chattels does not, by virtue of the sale, “appoint the chattel his agent for service of process”).

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the “the continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State. *Helicopteros*, 466 U. S., at 416.

* * * *

Cross References

Guiding Principles on business and human rights, **Chapter 6.A.3.c.**

Foreign Sovereign Immunities Act, **Chapter 10.A.**

OECD guidelines regarding conflict minerals, **Chapter 11.F.2.**

Chapter 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2011 relating to sanctions, export controls, and certain other restrictions relating to travel or U.S. government assistance. It does not cover developments in many of the United States' longstanding financial sanctions regimes, which are discussed in detail at www.treasury.gov/resource-center/sanctions/Pages/default.aspx. It also does not cover comprehensively developments relating to the export control programs administered by the Commerce Department or the defense trade control programs administered by the State Department. Detailed information on the Commerce Department's activities relating to export controls is provided in the U.S. Department of Commerce, Bureau of Industry and Security's Annual Report to the Congress for Fiscal Year 2011, available at www.bis.doc.gov/news/2012/bis_annual_report_2011.pdf. Details on the State Department's defense trade control programs are available at www.pmdtdc.state.gov.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS AND CERTAIN OTHER RESTRICTIONS

1. Libya

The United States took several steps in 2011 to protect civilians in Libya and target the regime of Muammar al-Qadhafi in response to its violent repression of peaceful protests, beginning in February 2011. U.S. actions were coordinated with the international community, including the Arab League and the United Nations. International and U.S. sanctions are discussed below. Chapter 3 discusses the UN Security Council's referral to the International Criminal Court. Chapter 6 discusses Libya's suspension from the Human Rights Council. Chapter 9 discusses recognition and succession of the new regime in Libya. And Chapter 18 discusses the use of force in halting the violence against civilians in Libya.

a. UN Security Council Resolutions

(1) Resolution 1970

On February 26, 2011, the UN Security Council, acting under Chapter VII, Article 41, adopted Resolution 1970 which was co-sponsored by the United States. U.N. Doc S/RES/1970. Resolution 1970 referred the situation in Libya to the International Criminal Court ("ICC"), imposed an arms embargo and other arms restrictions, imposed targeted sanctions on key figures in the Qadhafi regime, and provided for humanitarian assistance. The United States Mission to the United Nations issued a fact sheet on the resolution, available at <http://usun.state.gov/briefing/statements/2011/157194.htm> and excerpted below.

* * * *

The UN Security Council has adopted a comprehensive resolution to respond to the outrageous violence perpetrated by Muammar Qaddafi on the Libyan people. This resolution imposes immediate measures to stop the violence, ensure accountability and facilitate humanitarian aid.

The Security Council has demanded an end to the violence and urged Libyan authorities to respect human rights, ensure the safety of foreign nationals, allow the safe passage of humanitarian supplies and lift restrictions on all forms of media.

Significantly, the resolution:

- 1) Refers the situation to the International Criminal Court (ICC)
 - The Security Council referral gives the ICC jurisdiction over crimes committed in Libya after February 15, the day of the first protests in Benghazi. The ICC may investigate crimes including war crimes, crimes against humanity and genocide.
 - A referral to the ICC is necessary because Libya is not a party to the ICC Rome Statute.
 - The ICC Prosecutor will report regularly to the Security Council.
- 2) Imposes an arms embargo and other arms restrictions
 - All states are prohibited to provide any kind of arms to Libya.
 - All states are prohibited from allowing the transit to Libya of mercenaries.
 - Libya is prohibited from exporting any arms to any other state.
 - States are called upon to inspect suspicious cargo that may contain arms. When such arms are found, states are required to seize and dispose of them.
 - All states are called on to strongly discourage their nationals from traveling to Libya to contribute to human rights violations.
- 3) Imposes targeted sanctions on key regime figures
 - Seventeen Qaddafi loyalists are subject to an international travel ban.
 - Six of these individuals, including Qaddafi himself and his immediate family members, are also subject to a freeze of their assets.
 - The Security Council commits to ensure that any frozen assets will be made available to benefit the people of Libya.
 - A Sanctions Committee is established to impose targeted sanctions on additional individuals and entities who commit serious human rights abuses, including ordering attacks and aerial bombardments on civilian populations or facilities.
- 4) Provides for humanitarian assistance
 - All states are called upon to work together to facilitate humanitarian assistance and support the return of humanitarian agencies.
 - The Security Council expresses its readiness to consider additional measures to achieve the delivery of such assistance.
- 5) Commits to review the measures

* * * *

Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, delivered remarks hailing passage of the resolution, available at <http://usun.state.gov/briefing/statements/2011/157193.htm>:

* * * *

...When atrocities are committed against innocents, the international community must speak with one voice and today, it has. Tonight, acting under Chapter VII, the Security Council has come together to condemn the violence, pursue accountability, and adopt biting sanctions, targeting Libya's unrepentant leadership. This is a clear warning to the Libyan government: that it must stop the killing.

Those who slaughter civilians will be held personally accountable. The international community will not tolerate violence of any sort against the Libyan people by their government or security forces.

Resolution 1970 is a strong resolution. It includes a travel ban and an asset freeze for key Libyan leaders. It imposes a complete arms embargo on Libya. It takes new steps against the use of mercenaries by the Libyan government to attack its own people. And for the first time ever, the Security Council has unanimously referred an egregious human rights situation to the International Criminal Court.

As President Obama said today, when a leader's only means of staying in power is to use mass violence against his own people, he has lost the legitimacy to rule—and needs to do what is right for his country by leaving now.

The protests in Libya are being driven by the people of Libya. This is about people's ability to shape their own future, wherever they may be. It is about human rights and fundamental freedoms.

The Security Council has acted today to support the Libyan people's universal rights. These rights are not negotiable. They cannot be denied. Libya's leaders will be held accountable for violating these rights and for failing to meet their most basic responsibilities to their people.

* * * *

Ambassador Rice also answered questions from the press on the same day Resolution 1970 was passed. Her remarks, excerpted below, are available in full at <http://usun.state.gov/briefing/statements/2011/157195.htm>.

* * * *

Good evening, everyone. Tonight, the international community has spoken with one voice. Resolution 1970 imposes tough and binding measures that aim to stop the Libyan regime from killing its own people. We want to thank the delegation of the UK for its skillful leadership of this effort in the Council. And we're very pleased with the outcome, and also with the unity of purpose that the Council has showed in acting quickly and decisively in accordance with its responsibility to protect.

* * * *

...[I]t's very significant that the Council has acted so swiftly, and in unanimity around what are some outrageous and heinous crimes that are being committed by the government of Libya against its own people. The United States and all the members of the Council felt that what is transpiring is absolutely unacceptable and demanded an urgent and unanimous response. We are pleased to have supported this entire resolution and all of its measures, including the referral to the ICC. We are happy to have the opportunity to co-sponsor this and we think that it is a very powerful message to the leadership of Libya that this heinous killing must stop and that individuals will be held personally accountable.

* * * *

First of all, I can't remember a time in recent memory when the Council has acted so swiftly, so decisively, and in unanimity on an urgent matter of international human rights. So this in itself is mightily important. Secondly the resolution puts in place some very concrete enforcement mechanisms, a sanctions committee, panels to enforce and review these measures which we have learned are effective in helping the Security Council ensure the effective implementation of its resolutions. I think all members of the Security Council are united in their determination that these sanctions work, that they work as swiftly as possible, and that they have the intended effect of stopping the violence against innocent civilians.

* * * *

(2) Resolution 1973

On March 17, 2011, the Security Council adopted a second resolution on the situation in Libya, Resolution 1973. U.N. Doc S/RES/1973. Resolution 1973 authorized the use of force, imposed additional sanctions, and enhanced the existing sanctions regime. The March 18, 2011 fact sheet issued by the U.S. Mission to the UN describing the resolution appears below, and is available at <http://usun.state.gov/briefing/statements/2011/158614.htm>.

* * * *

Responding to urgent pleas from the Arab League and Libya's citizens, the UN Security Council has approved a significant resolution—the second in less than three weeks—to address the outrageous violence being perpetrated by Colonel Qadhafi on the Libyan people.

Resolution 1973 provides legal authority for the international community to use force to protect civilians.

To halt the violence, the Security Council:

1) Authorizes states to take all necessary measures to protect civilians

- States may use force to protect civilians and civilian populated areas under threat of attack. To exercise this authority, states can act nationally or through regional organizations.

- The League of Arab States is requested to cooperate.
- 2) Imposes a no-fly zone
 - All flights are banned in Libyan airspace, except those for certain purposes like humanitarian aid delivery or evacuating foreign nationals.
 - States may use force to enforce this ban. States are required to notify the UN Secretary-General of actions taken to enforce the ban.
 - Other states are called upon to provide assistance, including over-flight approvals, for the states implementing the no-fly zone.
 - 3) Authorizes states to take all necessary measures to enforce the arms embargo
 - States are called upon to inspect cargo of aircraft and vessels suspected of transporting arms or mercenaries in violation of the UN arms embargo.
 - If permission to inspect cargo is denied, then states may use force to carry out such inspections.
 - The Security Council's Libya Sanctions Committee may impose targeted sanctions (asset freezes/travel bans) on individuals and companies who violate the arms embargo.
 - 4) Provides for freezing assets of the Libyan authorities
 - The Security Council directs its Libya Sanctions Committee to identify within thirty days state companies to be subject to an asset freeze.
 - In an Annex, the Security Council designates several major state-owned entities—including the Libyan Central Bank, Libya's sovereign wealth fund and the Libyan National Oil Corporation—that are immediately subject to an asset freeze.
 - States must require their nationals to exercise vigilance when doing business with Libyan companies to make sure such business does not contribute to violence against civilians.
 - 5) Imposes other aviation restrictions
 - States must deny permission to take off from, land or overfly their territory to any Libyan aircraft.
 - States must also deny permission to take off from, land or overfly their territory to any aircraft suspected of transporting arms or mercenaries in violation of the arms embargo.
 - 6) Imposes targeted sanctions on more regime figures
 - In an annex, five state-owned companies and seven individuals are identified to be subject to an asset freeze, including two of Qadhafi's sons, his Director of Military Intelligence and the Defense Minister.
 - Two additional individuals—a Libyan ambassador and a colonel who are both involved in recruiting mercenaries—are identified to be subject to an international travel ban.
 - 7) Establishes a UN Panel of Experts (POE) to improve sanctions implementation.
 - The UN Secretary-General will appoint eight experts to monitor to improve enforcement of the UN sanctions contained in Resolution 1970 and this resolution.
 - This expert panel will also recommend ways to tighten enforcement of these sanctions.

* * * *

Ambassador Rice delivered a statement explaining the U.S. vote on Resolution 1973, excerpted below, and available at

<http://usun.state.gov/briefing/statements/2011/158559.htm>.

* * * *

...Today the Security Council has responded to the Libyan people's cry for help. This Council's purpose is clear: to protect innocent civilians.

On February 26, acting under Chapter VII, the Security Council demanded a halt to the violence in Libya and enabled genuine accountability for war crimes and crimes against humanity by referring the situation to the International Criminal Court. We adopted strong sanctions that target Libya's leadership. ... But Colonel Qadhafi and those who still stand by him continue to grossly and systematically abuse the most fundamental human rights of Libya's people. On March 12, the League of Arab States called on the Security Council to establish a no-fly zone and take other measures to protect civilians. Today's resolution is a powerful response to that call—and to the urgent needs on the ground.

This resolution demands an immediate cease fire and a complete end to violence and attacks against civilians. Responding to the Libyan people and to the League of Arab States, the Security Council has authorized the use of force, including enforcement of a no-fly zone, to protect civilians and civilian areas targeted by Colonel Qadhafi, his intelligence and security forces, and his mercenaries. The resolution also strengthens enforcement of the arms embargo and bans all international flights by Libyan-owned or -operated aircraft. The resolution freezes the assets of seven more individuals and five entities—including key state-owned Libyan companies. The resolution empowers the newly established Libyan Sanctions Committee to impose sanctions on those who violate the arms embargo, including by providing Qadhafi with mercenaries. Finally, the Council established a panel of experts to monitor and enhance short- and long-term implementation of the sanctions on Libya.

The future of Libya should be decided by the people of Libya. The United States stands with the Libyan people in support of their universal rights.

* * * *

Ambassador Rice also provided additional remarks and answered questions following passage of Resolution 1973 on March 17, 2011. Excerpts appear below and the full text is available at <http://usun.state.gov/briefing/statements/2011/158563.htm>.

* * * *

...[T]he U.S. is very pleased with today's vote and with the strong provisions of Resolution 1973. This resolution should send a strong message to Colonel Qadhafi and his regime that the

violence must stop, the killing must stop, and the people of Libya must be protected and have the opportunity to express themselves freely.

This resolution was designed to do two important things: protect civilians as well as strengthen the pressure on the Qadhafi regime through a substantial tightening of sanctions. Provisions for enforcement of the arms embargo, a ban on flights in and out of Libya with, in particular, a focus on those that may be carrying mercenaries, the designation of additional individuals and core Libyan-owned government companies for asset freezes, and a range of other very important measures. Taken together, the elements of Resolution 1973 are powerful and they ought to be heeded by the Qadhafi regime. ...

* * * *

...[T]he Council today acted in response to a strong request by the League of Arab States. This resolution was supported by the African members of the Council, by Lebanon, by a strong majority of the Council who agreed that the situation had become so grave that the provisions of 1970 had been flouted so dramatically and that the people of Libya were under imminent threat and continued risk of violence and took the decision to act. So I think the result speaks for itself. I won't characterize other countries' positions, but I will reiterate that the United States is pleased with the outcome.

* * * *

(3) Lifting sanctions

After the transition in government in Libya, the Security Council's Libya Sanctions Committee began lifting the sanctions. Some assets—including those of two sovereign wealth funds—remain subject to the sanctions regime because the government of Libya has not yet assured there are proper controls over these assets. Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, made the following statement on the removal of sanctions on December 16, 2011. The statement is available at <http://usun.state.gov/briefing/statements/2011/178964.htm>.

* * * *

The United States welcomes today's decision by the UN Security Council's Libya Sanctions Committee to remove the remaining financial sanctions on the Central Bank of Libya and the Libyan Arab Foreign Bank. This will allow the United States and other countries to unfreeze billions of dollars to help Libyans build their new democracy.

The financial sanctions imposed by UN Security Council resolutions 1970 and 1973 were important in halting Qadhafi's slaughter of the Libyan people. Now, as Libyans develop their new state, these sanctions can be ended responsibly. The United States will continue to work with the new government of Libya to ensure that it has the resources and support it needs, and we will stand with the Libyan people as they leave behind decades of tyranny and chart a prosperous, democratic and secure future for their country.

* * * *

b. U.S. sanctions and other controls

(1) Executive Order 13566

On February 25, 2011, President Barack Obama issued Executive Order 13566, “Blocking Property and Prohibiting Certain Transactions Related to Libya” (“E.O. 13566”) pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701-06 (“IEEPA”), the National Emergencies Act, 50 U.S.C. 1601, and 3 U.S.C. § 301. 76 Fed. Reg. 11,315 (Mar. 2, 2011). The order includes the President’s finding that the situation in Libya threatened the national security of the United States:

I... find that Colonel Muammar Qadhafi, his government, and close associates have taken extreme measures against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians. I further find that there is a serious risk that Libyan state assets will be misappropriated by Qadhafi, members of his government, members of his family, or his close associates if those assets are not protected. The foregoing circumstances, the prolonged attacks, and the increased numbers of Libyans seeking refuge in other countries from the attacks, have caused a deterioration in the security of Libya and pose a serious risk to its stability, thereby constituting an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.

Section 1 of E.O. 13566 blocks all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, including any overseas branch, of the persons listed in the annex to the order as well as those subsequently determined by the Treasury Department in consultation with the State Department:

- (i) to be a senior official of the Government of Libya;
- (ii) to be a child of Colonel Muammar Qadhafi;
- (iii) to be responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or to have participated in, the commission of human rights abuses related to political repression in Libya;
- (iv) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of the activities described in subsection (b)(iii) of this section or any person whose property and interests in property are blocked pursuant to this order;
- (v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, any person whose property and interests in property are blocked pursuant to this order; or

(vi) to be a spouse or dependent child of any person whose property and interests in property are blocked pursuant to this order.

Section 2 of E.O. 13566 blocks property of the government of Libya, its agencies, instrumentalities, and controlled entities, and the Central Bank of Libya. On July 1, 2011, the U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC") issued the Libyan Sanctions Regulations to implement E.O. 13566. 76 Fed. Reg. 38,562 (July 1, 2011).

On February 25, 2011, President Obama delivered a statement on the Libya sanctions:

The Libyan Government's continued violation of human rights, brutalization of its people, and outrageous threats have rightly drawn the strong and broad condemnation of the international community. By any measure, Muammar al-Qadhafi's Government has violated international norms and common decency and must be held accountable. These sanctions therefore target the Qadhafi Government, while protecting the assets that belong to the people of Libya.

Going forward, the United States will continue to closely coordinate our actions with the international community, including our friends and allies and the United Nations. We will stand steadfastly with the Libyan people in their demand for universal rights and a government that is responsive to their aspirations. Their human dignity cannot be denied.

Daily Comp. Pres. Docs., 2011 DCPD No. 00113, p. 1.

OFAC acted repeatedly pursuant to E.O. 13566, identifying and designating individuals and entities as subject to the asset freeze in the following notices in the Federal Register: 76 Fed. Reg. 17,188 (Mar. 28, 2011) (additional identifying information for five individuals listed in the annex to E.O. 13566); 76 Fed. Reg. 20,450 (Apr. 12, 2011) (nine individuals, including several members of Qadhafi's family); 76 Fed. Reg. 21,801 (Apr. 18, 2011) (five individuals and two entities); 76 Fed. Reg. 25,783 (May 5, 2011) (30 entities); 76 Fed. Reg. 28,503 (May 17, 2011) (three entities); 76 Fed. Reg. 37,404 (June 27, 2011) (nine entities). Among those designated were individuals and entities listed for sanctions by the UN Security Council's committee established pursuant to Resolution 1970. See www.un.org/sc/committees/1970/.

As officials defected from Qadhafi's regime and then, subsequent to Qadhafi's death, the United States began the process of unblocking assets by removing individuals and entities from the list of persons designated pursuant to E.O. 13566, in the following notices in the Federal Register: 76 Fed. Reg. 20,451 (Apr. 12, 2011); 76 Fed. Reg. 37,892 (June 28, 2011) (one individual); 76 Fed. Reg. 72,502 (Nov. 23, 2011) (42 entities).

After the United States recognized the Transitional National Council of Libya ("TNC") as the legitimate governing authority for Libya (see Chapter 9), OFAC issued General License No. 6 authorizing all transactions involving the TNC, provided that (1) the transactions do not involve any other person whose property and interests in property are blocked; and (2) all property and interests in property blocked pursuant to E.O. 13566 remain blocked. OFAC later issued General License Nos. 7A, 8A, and 11 authorizing transactions involving the

government of Libya, subject to certain limitations. See OFAC, Overview of Sanctions, available at www.treasury.gov/resource-center/sanctions/Programs/Documents/libya.pdf.

(2) Implementing UN Security Council Resolutions

As discussed in Section A.1.b.(1) above, the United States implemented the asset freeze provisions in the Security Council resolutions via designations under E.O. 13566. At a February 28, 2011 White House press briefing, Ambassador Rice referred to steps the United States had already taken to implement the asset freeze imposed by Resolution 1970. See February 28, 2011 White House Press Briefing, available at www.whitehouse.gov/the-press-office/2011/02/28/press-briefing-press-secretary-jay-carney-and-us-permanent-representativ.

On April 26, 2011, President Obama directed the drawdown of resources under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2348a, of up to \$25 million to support efforts to protect civilians in Libya, in furtherance of the calls for humanitarian assistance in Security Councils Resolutions 1970 and 1973. 76 Fed. Reg. 27,845 (May 13, 2011).

Effective May 24, 2011, the U.S. Department of State amended the International Traffic in Arms Regulations (“ITAR”), 22 CFR Part 126, in order to implement the arms embargoes adopted by the UN Security Council in Resolutions 1970 and 1973. 76 Fed. Reg. 30,001 (May 24, 2011). ITAR lists countries to which exports of arms are prohibited due to Security Council action. The notice in the Federal Register explained:

This rulemaking implements the Security Council’s actions within the ITAR by adding Libya to Sec. 126.1(c) and revising the previous policy on Libya contained in Sec. 126.1(k) to announce a policy of denial for all requests for licenses or other approvals to export or otherwise transfer defense articles and services to Libya, except where not prohibited under UNSC embargo and determined to be in the interests of the national security and foreign policy of the United States.

(3) Invoking the extraordinary expenses exemption in UNSCR 1970

On August 8, 2011, the United States requested that the committee established pursuant to UNSCR 1970 approve an exemption to the asset freeze provisions under that resolution in order to allow frozen assets to be used to provide humanitarian aid to Libya. The letter making the request, addressed to Jose Felipe Maraes Cabral, chairman of the committee established pursuant to Resolution 1970, is excerpted below and available at www.state.gov/s/l/c8183.htm.

* * * *

Dear Ambassador:

The United States requests the Committee to approve, pursuant to paragraph 19(b) of resolution 1970 (2011), an exemption to the measures imposed in paragraph 17 of resolution 1970 (2011), as extended by paragraph 22 of resolution 1973 (2011), for funds that are necessary for extraordinary expenses. This exemption is requested for funds, financial assets and economic resources that are owned or controlled, directly or indirectly by listed entities, including the Central Bank of Libya, the Libyan Investment Authority, the Libyan Foreign Bank, the Libyan Africa Investment Portfolio and the Libyan National Oil Corporation.

Purposes

The purposes of this request are to ensure the delivery of urgently-needed humanitarian aid and to begin the process envisioned in paragraph 20 of resolution 1973 (2011) to ensure that frozen assets shall, at a later stage, as soon as possible be made available to and for the benefit of the people of Libya.

The United States requests that this exemption allow the unfreezing of assets for the amounts, recipients and purposes specified in Annex 1. These assets would be transferred to three categories of recipients:

- 1) Humanitarian organizations to respond to initial and currently anticipated humanitarian needs, in line with the UN Appeal and its expected revisions (up to \$500 million);
- 2) Third-party vendors supplying fuel and other urgently-needed humanitarian goods (up to \$500 million);
- 3) The Temporary Financial Mechanism (TFM) to pay for salaries and operating expenses of Libyan civil servants and for food subsidies, electricity and other humanitarian purchases (up to \$500 million)

Safeguards

To ensure an appropriate and balanced distribution of assistance:

- No funds will be provided for the purchase of arms, non-lethal military equipment or any other military-related activity.
- Payments to third-party vendors for fuel costs will be made for fuel used strictly for humanitarian and civilian purchases (e.g. generating electricity, hospitals), not military activity, based on written assurances from the National Transition Council (TNC).
- Funds to be transferred to the TFM will be subject to TFM procedures, including the TFM's existing accounting procedures and safeguards, such as significant oversight and audits.
- A substantial portion of the funds (up to 20 percent or \$100 million) transferred to the TFM would be allocated to benefit Libyans in areas not under the control of the TNC. The mechanism to ensure these transfers will be identified by the TNC (e.g. for food subsidies, electricity and other humanitarian purchases). The United States will retain the authority to hold back the release of up to \$100 million of these funds until the TNC devises a credible, transparent and effective means of delivering these resources to areas not under its control.
- The United States will submit to the Committee every 120 days a report containing additional and updated information regarding these expenses, including precise amounts unfrozen and disbursed, the needs being addressed by the unfrozen assets, steps taken to coordinate donor assistance and measures imposed to mitigate the risk of abuse and diversion.

Coordination

The United States anticipates that other Member States will also request exemptions pursuant to paragraph 19(b) of resolution 1970 (2011) for these same purposes. The United

States will coordinate with these other Member States, as appropriate, as well as relevant international organizations, to ensure coordinated and efficient allocation of unfrozen funds, in particular to ensure that transfers to humanitarian organizations meet the needs identified by OCHA.

Please accept, Excellency, the assurances of my highest consideration.

Sincerely,

Howard Wachtel
Adviser

* * * *

2. Iran

In 2011, the United States continued to pursue its dual-track approach to preventing Iran from gaining a nuclear weapons capability. See *Digest 2009* at 585–90 and 773–74.

Together with its international partners, the United States reaffirmed its commitment to engaging Iran diplomatically while imposing extensive new sanctions to respond to Iran’s continued inflexibility.

a. Implementation of UN Security Council Resolutions

On June 9, 2010, the UN Security Council adopted Resolution 1929, which imposed additional sanctions with respect to Iran’s nuclear and ballistic missile programs under Article 41 of Chapter VII of the UN Charter. U.N. Doc. S/RES/1929. See *Digest 2010* at 632–45. Resolution 1929 was the fourth such Security Council Resolution to impose sanctions on Iran, following Resolution 1737 (2006), Resolution 1747 (2007) and Resolution 1803 (2008). U.N. Docs. S/RES/1737, S/RES/1747, and S/RES/1803. See *Digest 2006* at 1280–84, *Digest 2007* at 1031–36, *Digest 2008* at 969–75, and *Digest 2010* at 632–37 for discussions of the Security Council’s previous resolutions.

In 2011, the United States continued to demonstrate strong support for full implementation of the Security Council resolutions on Iran through statements at the Security Council and actions taken to implement the resolutions.

(1) Statements in the Security Council

On March 22, 2011, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, addressed the Security Council at a briefing on Iran and Resolution 1737. Her remarks, excerpted below, are available at <http://usun.state.gov/briefing/statements/2011/158818.htm>.

* * * *

It has now been more than nine months since this Council adopted its sixth resolution on Iran—and its fourth to impose sanctions—in response to Iran’s continued refusal to comply with its international nuclear obligations. Unfortunately, once again, when it comes to Iran’s actions, little has changed since we met three months ago. Let me make three key points.

First, the IAEA Director General continues to report Iran’s ongoing violation of its NPT, Security Council, and IAEA safeguards obligations. Most troubling, the Director General has stated that Iran has once again refused to discuss the possible military dimensions to its nuclear program, including credible reports of Iranian efforts to develop a nuclear warhead—an issue Iran incorrectly asserts is “closed.”

The report details Iran’s many ongoing failures to cooperate with the Agency’s investigation and Iran’s violations of its international nuclear obligations, including its failure to suspend enrichment-related activities and its work on heavy-water-related projects. After a careful presentation of the facts, the Director General concludes that the Agency is unable “to provide credible assurance about the absence of undeclared nuclear material and activities in Iran,” and therefore is unable “to conclude that all nuclear material in Iran is in peaceful activities.” This conclusion is cause for grave concern for this Council and for the international community at large.

Second, Mr. President, it is absolutely critical that all member states continue to take the necessary steps to fully and robustly implement Security Council resolutions 1737, 1747, 1803, and 1929. This includes taking the necessary steps domestically to ensure effective implementation. It also includes submitting national-implementation reports and cooperating fully with the 1737 Committee and the Panel of Experts. In this regard, we welcome Nigeria’s excellent example of enforcing these measures, including its recent seizure of an Iranian shipment of arms and related materiel and its cooperation with the Committee and Panel in investigating this violation. Recent press reports of other potential violations, such as the Iranian weapons seized on the M/V Victoria, underline the continuing need for a high level of vigilance on the part of all Member States.

In addition to the important role played by member states, the 1737 Committee and the Panel of Experts are critical to better implementation and enforcement of the Iran sanctions regime. The United States thanks the Panel for its efforts in the few months that it has been operational. This group has started strong. We have been impressed by its hard work. The 1737 Committee should be prepared to act quickly to implement recommendations from the Panel—and take additional steps in line with its program of work to tighten sanctions enforcement.

A few weeks ago, my government hosted the Panel in Washington for a series of consultations. We encourage other member states to take similar steps and do what they can to fully support the Panel’s efforts.

Finally, let me reiterate my government’s commitment to a diplomatic solution. We met with Iran a little more than a month ago with the sincere intent of starting a process of meaningful and constructive engagement between the P5+1 and Iran. The P5+1 came to the meeting without preconditions—and with specific, practical proposals aimed at building confidence. We made every effort to secure agreement. We had hoped to have a detailed, constructive discussion about those ideas, but instead, Iran presented unacceptable preconditions. Iran’s performance in Istanbul was deeply disappointing. We now look to Iran to show the international community that it has decided to address the international community’s serious concerns about Iran’s troubling nuclear activities.

Our goal remains to prevent Iran from developing nuclear weapons. We remain committed to working closely with our partners in this Council and the international community toward that goal.

* * * *

Ambassador DiCarlo spoke again on the implementation of Resolution 1737 (2006) at a Security Council briefing on December 21, 2011. Her remarks, excerpted below, are available at <http://usun.state.gov/briefing/statements/2011/158818.htm>.

* * * *

Since we last met, the IAEA Director General has released a damning report on the status of Iran's implementation of its NPT Safeguards Agreement and its response to UN Security Council resolutions on Iran. The report concluded that Iran remains in noncompliance with its international nuclear obligations—and added to the mountain of evidence that Iran is misleading international community about its nuclear activities and its nuclear intentions.

Of even greater concern, this report addressed the question at the heart of the international community's concerns: has Iran carried out, and is it still carrying out, activities related to the development of a nuclear weapon? The report is clear: the IAEA's information indicates that Iran has carried out activities that are—and I quote—"relevant to the development of a nuclear explosive device." The report further states "that prior to the end of 2003, these activities took place under a structured program, and that some activities may still be ongoing."

* * * *

The decision by the IAEA Board of Governors last month to censure Iran demonstrated yet again the overwhelming view of the international community that Iran's illicit nuclear activities are unacceptable.

The Council therefore must redouble its efforts to implement the sanctions already imposed. Full implementation of these measures will show Iran there is a price to be paid for its deception. Full implementation can also slow down Iran's nuclear progress, buying us more time to resolve this crisis through diplomatic means.

The 1737 Committee and Panel of Experts are key to this effort. These bodies must continue effectively—and robustly—to implement their mandates and programs of work. The Committee must reinvigorate its efforts to implement the Panel's recommendations, including to publish further detailed Implementation Assistance Notices to help Member States meet their obligations. The Panel must continue to investigate sanctions violations and promote international awareness of the measures we have imposed.

The United States would like to express appreciation for the Panel's recent work, including its Midterm Report and its recent report on Iran's space-launch activity, which involved both projects related to ballistic missiles capable of delivering nuclear weapons and launches using ballistic missile technology in violation of resolution 1929 (2010). The Committee should review these reports carefully and take action in response. The Committee must also do more to respond to sanctions violations and sanctions violators, such as by designating violators for targeted sanctions. Resolution 1929 (2010) directed the Committee to

respond effectively to these violations; Resolutions 1803 (2008) and 1929 (2010) also decided that the Committee may designate additional individuals and entities that have assisted in evasion of sanctions or violations of Security Council resolutions. New designations of such individuals and entities would send a powerful signal of the Committee's commitment to enforce UN Security Council resolutions.

* * * *

Mr. President, sanctions are only a means to an end. Our ultimate goal is to ensure that Iran enters into full compliance with all its international nuclear obligations and takes the steps necessary to resolve outstanding questions. In the face of Iran's deception and intransigence, the international community must speak with one voice, making clear that Iranian actions jeopardize international peace and security and will only further isolate the regime.

* * * *

(2) Communication to the Committee established pursuant to Resolution 1737

On July 15, 2011, the United States Mission to the UN submitted a communication on behalf of the United States, France, Germany, and the United Kingdom to the Chairman of the Security Council Committee established pursuant to Resolution 1737 (2006). The communication brought to the attention of the 1737 Committee the violation by Iran of paragraph 9 of resolution 1929 that occurred when Iran successfully launched a satellite into space using its Safir space launch vehicle, which Iran had announced on June 15. The Safir is based on Iran's Shahab-3 medium range ballistic missile, which is a Missile Technology Control Regime ("MTCR") Category I system. Paragraph 9 of resolution 1929 prohibits any activity by Iran related to "ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology." Accordingly, Iran's launch using the Safir violated resolution 1929. The United States and the other states on whose behalf the communication was made expressed their intention to cooperate with the Committee in investigating and responding to the violation.

b. U.S. sanctions and other controls

(1) New Executive Order 13590 and other steps taken in November 2011

On November 21, 2011, the United States announced a series of steps to increase pressure on Iran following a report by the Director General of the International Atomic Energy Agency ("IAEA") and a vote by the IAEA Board of Governors holding the Iranian regime accountable for its refusal to comply with international obligations regarding its nuclear program. See State Department fact sheet dated November 21, 2011, available at www.state.gov/r/pa/prs/ps/2011/11/177609.htm. This section discusses two of these steps: a new executive order ("E.O.") expanding energy-related sanctions on Iran and the designation of Iran under the Patriot Act as a jurisdiction of "primary money laundering concern." A third step, designations under the existing E.O. 13382 on nonproliferation, is

discussed in section A.2.b.(3) below covering all Iran-related designations in 2011 pursuant to E.O. 13382.

Secretary of State Hillary Rodham Clinton and Treasury Secretary Tim Geithner held a joint press conference on November 21 to announce these coordinated measures of the U.S. government directed at Iran. Secretary Clinton's remarks are excerpted below and are available at www.state.gov/secretary/rm/2011/11/177610.htm.

* * * *

Recent days have brought new evidence that Iran's leaders continue to defy their international obligations and violate international norms, including the recent plot to assassinate the Saudi Ambassador here in the United States and as verified by the new report from the International Atomic Energy Agency that further documents Iran's conduct of activities directly related to the development of nuclear weapons. Now, this report from the IAEA is not the United States or our European partners making accusations; this is the result of an independent review and it reflects the judgment of the international community.

There have to be consequences for such behavior. So on Friday, Iran was condemned in votes at the UN in New York and at the IAEA in Vienna. And earlier today, the UN General Assembly again strongly reprimanded Iran for continuing human rights abuses, persecution of minorities, and forcible restrictions on political freedom. The message is clear: If Iran's intransigence continues, it will face increasing pressure and isolation.

Today the United States is taking a series of steps to sharpen this choice.

* * * *

Together, these measures represent a significant ratcheting up of pressure on Iran, its sources of income, and its illegal activities. They build on an extensive existing sanctions regime put into place by the UN Security Council and a large number of countries, including our own, acting nationally and multilaterally to implement the Council's measures. And these sanctions are already having a dramatic effect. They have almost completely isolated Iran from the international financial sector and have made it very risky and costly a place to do business.

Most of the world's major energy companies have left, undermining Iran's efforts to boost its declining oil production, its main source of revenues. Iran has found it much more difficult to operate its national airline and shipping companies, and to procure equipment and technology for its prohibited weapons programs. And those individuals and organizations responsible for terrorism and human rights abuses, including the Revolutionary Guard Corps and its Qods Force, have been specifically targeted.

The impact will only grow unless Iran's leaders decide to change course and meet their international obligations. And let me be clear: Today's actions do not exhaust our opportunities to sanction Iran. We continue actively to consider a range of increasingly aggressive measures. We have worked closely with Congress and have put to effective use the legislative tools they have provided. We are committed to continuing our collaboration to develop additional sanctions that will have the effect we all want: putting strong pressure on Iran.

Now, the Administration's dual-track strategy is not only about pressure. It is also about engaging Iran, engagement that would be aimed at resolving the international community's serious and growing concerns about Iran's nuclear program. And the United States is committed to engagement, but only—and I say only—if Iran is prepared to engage seriously and concretely without preconditions. So far, we have seen little indication that Iran is serious about negotiations on its nuclear program. And until we do, and until Iran's leaders live up to their international obligations, they will face increasing consequences.

* * * *

(i) Executive Order 13590

On November 19, 2011, President Obama signed Executive Order 13590, "Authorizing the Imposition of Certain Sanctions With Respect to the Provision of Goods, Services, Technology, or Support for Iran's Energy and Petrochemical Sectors." 76 Fed. Reg. 72,609 (Nov. 23, 2011). President Obama acted under the authority of the Constitution and U.S. laws including the International Emergency Economic Powers Act ("IEEPA"), the National Emergencies Act, and 3 U.S.C. § 301. The State Department fact sheet on the November measures, available at www.state.gov/r/pa/prs/ps/2011/11/177609.htm, excerpted below, outlines the main provisions of the new executive order.

* * * *

...E.O. 13590 ... significantly expands existing energy-related sanctions on Iran to authorize sanctions on persons that knowingly provide:

1. **Goods, Services, Technology, or Support for the Development of Petroleum Resources:** The sale, lease, or provision of goods, services, technology, or support to Iran that could directly and significantly contribute to the enhancement of Iran's ability to develop petroleum resources located in Iran could trigger sanctions if a single transaction has a fair market value of \$1 million or more, or if a series of transactions from the same entity have a fair market value of \$5 million or more in a 12-month period.

2. **Goods, Services, Technology, or Support for the Maintenance or Expansion of the Petrochemical Sector:** The sale, lease, or provision of goods, services, technology, or support to Iran that could directly and significantly facilitate the maintenance or expansion of its domestic production of petrochemical products could trigger sanctions if a single transaction has a fair market value of \$250,000 or more, or if a series of transactions from the same entity have a fair market value of \$1 million or more in a 12-month period.

If a person is found to have provided a good, service, technology, or support described in E.O. 13590, the Secretary of State, in consultation with other agencies, has the authority to impose sanctions, including prohibitions on: foreign exchange transactions; banking transactions; property transactions in the United States; U.S. Export-Import Bank financing; U.S. export licenses; imports into the United States; loans of more than \$10 million from U.S. financial

institutions; U.S. Government procurement contracts; and, for financial institutions, designation as a primary dealer or repository of U.S. Government funds.

* * * *

In a background briefing on the November 2011 measures against Iran, one senior U.S. government official explained how the new executive order fits in with existing sanctions targeting Iran's energy sector, such as those authorized by the Iran Sanctions Act ("ISA"), as amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"):

U.S. law already prohibits large-scale investment in these upstream oil and gas activities. And what's happened is the major oil companies have all left Iran, and what Iran has done to circumvent this sanction is to get domestic Iranian companies and smaller foreign companies to provide technology, equipment, and engineering services to help them develop their oil and gas resources. They're desperately in need of capital and technology because their oil production is declining. And what this measure will do is to impede their efforts to reverse this decline. And this is critical because oil production is critical to the Iranian economy. It's the main source of revenue for Iran. So this is a very important step.

A second step was also covered by this Executive Order 13590 and that is it allows us to impose sanctions on companies that provide goods, services, and technology to Iran's petrochemical industry. This is the first time we have targeted Iran's petrochemical industry. It's a very important sector of the Iranian economy. After crude oil, it's the biggest export earner for Iran. Indeed, about 50 percent of Iran's non crude oil exports come from the sale of petrochemicals.

* * * *

...Currently, the ISA-CISADA legislation covers large-scale investments in upstream oil and gas activities like exploration, development, extraction, so on. CISADA deals with refined petroleum in one of two ways: It sanctions the provision of goods and services and technology for Iran's refinery industry; it also sanctions the provision of refined petroleum products, for example the sale of gasoline to Iran. That's what existing measures call for.

This ... Executive Order does two very different things. For upstream oil and gas activities, it goes beyond investment to the provision of goods and services, for example, the sale of drilling equipment, the provision of engineering services. These are very, very important to help Iran develop its energy, its petroleum resources. And they're vital to enable Iran to reverse this long-term decline in its production of oil, which means a decline in oil revenue. So that's a vital loophole to fill.

Second, it deals for the first time with Iran's ... petrochemical industry, which is distinct from its refinery industry. And it allows us to sanction companies providing goods and services and technology to help maintain and expand the petrochemical industry. And as I also said, we're launching a diplomatic campaign to discourage

purchases of Iran's petrochemical products, which are a major source of export earnings for Iran.

Background briefing on the recently announced sanctions on Iran, available at www.state.gov/r/pa/prs/ps/2011/11/177613.htm.

Section 1 of the order, describing activity that subjects a person to sanctions, is set forth below.

* * * *

Section 1. The Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Commerce, and the United States Trade Representative, and with the President of the Export-Import Bank, the Chairman of the Board of Governors of the Federal Reserve System, and other agencies and officials as appropriate, is hereby authorized to impose on a person any of the sanctions described in section 2 or 3 of this order upon determining that the person:

(a) knowingly, on or after the effective date of this order, sells, leases, or provides to Iran goods, services, technology, or support that has a fair market value of \$1,000,000 or more or that, during a 12-month period, has an aggregate fair market value of \$5,000,000 or more, and that could directly and significantly contribute to the maintenance or enhancement of Iran's ability to develop petroleum resources located in Iran;

(b) knowingly, on or after the effective date of this order, sells, leases, or provides to Iran goods, services, technology, or support that has a fair market value of \$250,000 or more or that, during a 12-month period, has an aggregate fair market value of \$1,000,000 or more, and that could directly and significantly contribute to the maintenance or expansion of Iran's domestic production of petrochemical products;

(c) is a successor entity to a person referred to in subsection (a) or (b) of this section;

(d) owns or controls a person referred to in subsection (a) or (b) of this section, and had actual knowledge or should have known that the person engaged in the activities referred to in that subsection; or

(e) is owned or controlled by, or under common ownership or control with, a person referred to in subsection (a) or (b) of this section, and knowingly participated in the activities referred to in that subsection.

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(ii) Designating Iran as a Jurisdiction of Primary Money Laundering Concern

On November 21, 2011, the Treasury Department designated the Islamic Republic of Iran ("Iran") as a jurisdiction of primary money laundering concern pursuant to § 311 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 31 U.S.C. § 5318A (2002). 76 Fed. Reg. 72,756 (Nov. 25, 2011). See *Digest 2002* at 126-31, *Digest 2003* at 208-12, *Digest 2004* at

136-39, *Digest 2005* at 180-84, *Digest 2006* at 243-53 regarding previous designations pursuant to § 311. At the November 21, 2011 joint press conference with Secretary Clinton, Secretary Geithner described the action. The full text of the press conference is available at www.state.gov/secretary/rm/2011/11/177610.htm.

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Today, we are taking the very significant step of acting under Section 311 of the Patriot Act. For the first time, we are identifying the entire Iranian banking sector, including the Central Bank of Iran, as a threat to governments or financial institutions that do business with Iranian banks. If you are a financial institutions anywhere in the world and you engage in any transaction involving Iran's central bank or any other Iranian bank operating inside or outside Iran, then you are at risk of supporting Iran's illicit activities: ... its pursuit of nuclear weapons, its support for terrorism, and its efforts to deceive responsible financial institutions and to evade sanctions. Any and every financial transaction with Iran poses grave risk of supporting those activities, so financial institutions around the world should think hard about the risks of doing business with Iran.

We are taking this action, as the Secretary said, alongside our partners in the United Kingdom and Canada, who announced earlier today that they were implementing similar measures to insulate their banks from Iran. And as a result of this coordinated effort, Iran is now cut off from three of the world's largest financial sectors. We encourage other leaders around the world to take forceful steps like these actions to prevent Iran from simply shifting financial activity to banks within their nations.

As we put these new measures in place and as we continue to work to expand their reach around the world, we will continue to explore other measures. No option is off the table, including the possibility of imposing additional sanctions on the Central Bank of Iran. The policies Iran is pursuing are unacceptable, and until Iran's leadership agrees to abandon this dangerous course, we will continue to use tough and innovative means to impose severe economic and financial consequences on Iran's leadership.

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Section 311 of the PATRIOT Act identifies factors to be considered as grounds for finding that a jurisdiction is a primary money laundering concern. Treasury's finding, as published in the Federal Register and excerpted below (with footnotes omitted), presented the application of these factors to Iran. 76 Fed. Reg. 72,756, 72,757-63 (Nov. 25, 2011).

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A. Evidence That Organized Criminal Groups, International Terrorists, or Entities Involved in the Proliferation of Weapons of Mass Destruction or Missiles, Have Transacted Business in That Jurisdiction

1. Iran's Support for Terrorism and Pursuit of Nuclear and Ballistic Missile Capabilities

Support for Terrorism: The Department of State designated Iran as a state sponsor of international terrorism in 1984, and has reiterated this designation every year since 2000 in its annual Country Reports on Terrorism. Iran remains the most active of the listed state sponsors of terrorism, routinely providing substantial resources and guidance to multiple terrorist organizations. Iran has provided extensive funding, training, and weaponry to Palestinian terrorist groups, including Hamas and the Palestinian Islamic Jihad ("PIJ"). In fact, Hamas, PIJ, and Hizballah have maintained offices in Tehran to help coordinate Iranian financing and training of these groups.

Iran's Islamic Revolutionary Guard Corps ("IRGC") was founded in the aftermath of the 1979 Islamic Revolution to defend the government against internal and external threats. Since then, it has expanded far beyond its original mandate and evolved into a social, military, political, and economic force with strong influence on Iran's power structure. In addition, elements of the IRGC have been directly involved in the planning and support of terrorist acts throughout the Middle East region.

In particular, Iran has used the IRGC-Qods Force ("Qods Force") to cultivate and support terrorists and militant groups abroad. The Qods Force reportedly has been active in the Levant, where it has a long history of supporting Hizballah's military, paramilitary, and terrorist activities, and provides Hizballah with as much as \$200 million in funding per year. Additionally, the Qods Force provides the Taliban in Afghanistan with weapons, funding, logistics, and training in support of anti-U.S. and anti-coalition activity. Information dating from at least 2006 indicates that Iran has arranged frequent shipments to the Taliban of small arms and associated ammunition, rocket propelled grenades, mortar rounds, 107 mm rockets, and plastic explosives. Iran also has helped train Taliban fighters within Iran and Afghanistan. Taliban commanders have stated that they were paid by Iran to attend three month training courses within Iran. In August 2011, a Taliban commander claimed to have trained in Iran and been offered \$50,000 by Iranian officials in return for destroying a dam in Afghanistan. Most recently, on October 11, 2011, the Department of Justice charged two individuals for their alleged participation in a plot directed by the Qods Force to murder the Saudi ambassador to the United States with explosives while the Ambassador was in the United States. On the same day, the Treasury Department announced the designation of five individuals, including the commander of the Qods Force and three other senior Qods Force officers connected to the assassination plot, as well as the individual responsible for arranging the assassination plot on behalf of the Qods Force.

Iran has also permitted al-Qaida to funnel funds and operatives through its territory. In July 2011, the U.S. Department of the Treasury ("Treasury") designated an al-Qa'ida network headed by an individual living and operating in Iran under an agreement between al-Qa'ida and the Iranian government. The designation of six members of this network illustrated Iran's role as a critical transit point for funding to support al-Qa'ida's activities in Afghanistan and Pakistan as this network serves as a pipeline through which al-Qa'ida moves money, facilitators, and operatives from across the Middle East to South Asia.

Finally, Iran is known to have used state-owned banks to facilitate terrorist financing. In 2007, the Treasury designated Bank Saderat under E.O. 13224 for its financial support of terrorist organizations, noting that from 2001 to 2006 Bank Saderat transferred \$50 million from the Central Bank of Iran through its subsidiary in London to its branch in Beirut for the benefit of Hizballah fronts in Lebanon that support acts of violence.

Pursuit of nuclear/ballistic missile capabilities: Iran also continues to defy the international community by pursuing nuclear capabilities and developing ballistic missiles in violation of seven UNSCRs. Iran's failure to comply with these resolutions has resulted in the UN Security Council's imposition of sanctions against Iran. These have included specific provisions aimed at preventing Iran from accessing the international financial system in order to pursue nuclear capabilities and to develop ballistic missiles. To date, Iran has not complied with the UN Security Council resolutions regarding its nuclear and missile activities, and continues to assert that it will not abandon its program to create nuclear fuel and enrich uranium. This summer, Iran announced that it would triple production of its most concentrated uranium fuel, which is enriched to near 20% purity, and that some of this production would be transferred to Iran's facility near Qom. This is a significant development because the technical work required to produce 20% enriched uranium from 3.5% is more difficult than that required to advance from 20% to the 90% weapons-grade level.

2. Use of government agencies and state-owned or controlled financial institutions to facilitate WMD proliferation and financing

Iran uses government agencies and state-owned or controlled financial institutions to advance its nuclear and ballistic missile ambitions. Specifically, the government agencies rely on state-owned Iranian financial institutions to help finance illicit procurement activities related to WMD proliferation.

Government Agencies: Iran has used the Atomic Energy Organization of Iran ("AEOI"), which was designated by Treasury as the main Iranian organization for research and development activities in the field of nuclear technology, including Iran's uranium enrichment program, to manage the country's overall nuclear program. Additionally, Iran has relied on the Ministry of Defense and Armed Forces Logistics ("MODAFL"), which was designated by the State Department under Executive Order ("E.O.") 13382 for proliferation activities. Iran also controls the Defense Industries Organization ("DIO"), which has been designated by the UN and the United States, and the Aerospace Industries Organization ("AIO"), which is identified in the Annex to E.O. 13382 for its role in overseeing Iran's missile industries. AIO, the parent entity to Shahid Hemat Industrial Group (SHIG), which is also listed in the Annex to E.O. 13382, was identified for its ballistic missile research, development, and production activities, in addition to overseeing all of Iran's missile industries.

State-owned or controlled banks: Multiple Iranian financial institutions have been directly implicated in facilitating Iran's nuclear and ballistic missile activities. For example, Iranian state-owned Bank Sepah was designated by the Treasury Department under E.O. 13382 and designated in UNSCR 1747 for providing direct and extensive financial services to Iranian entities responsible for developing ballistic missiles, including AIO and SHIG. Iran's state-owned Bank Melli, which was identified in UNSCR 1803, has also facilitated numerous purchases of sensitive materials for Iran's nuclear and missile programs on behalf of UN-designated entities. Treasury found that Bank Melli has provided a range of financial services to known proliferators, including opening letters of credit and maintaining accounts. Additionally, Treasury found, following the designation of Bank Sepah under UNSCR 1747 for its support for AIO and AIO's subordinates, Bank Melli took precautions not to identify Bank Sepah in transactions. Treasury designated Bank Melli and associated subsidiaries and front companies under E.O. 13382 for its financial support to entities involved in the proliferation of weapons of mass destruction. Multiple jurisdictions also have designated Bank Melli under their respective legal authorities.

Treasury has also designated under E.O. 13382 Bank Mellat, another Iranian state-owned bank, for financially facilitating Iran's nuclear and proliferation activities by supporting AEOI and its main financial conduit, Novin Energy Company ("Novin"). Specifically, the designation noted that as of October 2007, Bank Mellat had facilitated the movement of millions of dollars for Iran's nuclear program since at least 2003. In November 2009, First East Export Bank was designated pursuant to E.O. 13382 as a subsidiary and for its support of Bank Mellat. Furthermore, the international community has raised concerns and taken action against Bank Mellat. In October 2009, the United Kingdom's ("UK") HM Treasury issued an order to all of its financial and credit institutions to cease all business with Bank Mellat, based on its connection to Iran's proliferation activities and for being involved in transactions related to financing Iran's nuclear and ballistic missile program. Noting that Bank Mellat itself has facilitated hundreds of millions of dollars in transactions for Iranian nuclear, missile, and defense entities, UNSCR 1929 designated First East Export Bank, a Bank Mellat subsidiary in Malaysia. Since the adoption of UNSCR 1929, the European Union ("EU"), Japan, South Korea, Australia, Canada, Norway, and Switzerland have implemented measures against Bank Mellat.

In October 2008, Treasury designated the Export Development Bank of Iran ("EDBI") under E.O. 13382 for providing or attempting to provide financial services to MODAFL. The designation further asserted that EDBI provides financial services to multiple MODAFL-subordinate entities and facilitated the ongoing procurement activities of various front companies associated with MODAFL-subordinate entities. Treasury's designation also noted that, since Bank Sepah's designation by the United States and identification by the UN Security Council, EDBI has served as one of the leading intermediaries handling Bank Sepah's financing, including WMD-related payments, and has facilitated transactions for other sanctioned proliferation-related entities.

As the Iranian banks described above have become increasingly isolated from the international financial system due to international sanctions, other Iranian banks have begun to play a larger role in Iran's illicit activities and efforts to circumvent sanctions. The Treasury Department has continued to target Iranian banks that engage in illicit behavior and act on behalf of U.S.-designated, Iranian-linked banks. Treasury designated Post Bank for operating on behalf of Bank Sepah; the Iranian-owned German bank EIH for providing financial services to Bank Mellat, Persia International Bank, EDBI, and Post Bank; Bank Refah for providing financial services to MODAFL; Bank of Industry and Mine for providing financial services to Bank Mellat and EIH; and Ansar Bank and Mehr Bank for providing financial services to the IRGC. The EU and other jurisdictions have recognized the risks posed by the vast majority of these financial institutions and have imposed similar measures to prohibit banks in their jurisdictions from doing business with these entities. As recently as May 2011, the EU designated EIH for playing a "key role in assisting a number of Iranian banks with alternative options for completing transactions disrupted by EU sanctions targeting Iran."

3. The Iranian Government's Use of Deceptive Financial Practices

Since 1979, Iran long has been subject to a variety of U.S. sanctions that have significantly expanded over time, including prohibition of the importation of Iranian-origin goods and services, prohibitions on certain transactions with respect to the development of Iranian petroleum resources, and prohibitions on exports and re-exports to Iran. Today, most trade-related transactions with Iran are prohibited, and U.S. financial institutions are generally prohibited, with only limited exceptions, from doing business with Iranian financial institutions.

To further amplify financial pressure on Iranian financial institutions involved in Iran's support for terrorism and weapons proliferation, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA") on July 1, 2010, which includes a provision that authorizes the Secretary of the Treasury to impose sanctions on foreign financial institutions that knowingly facilitate certain activities related to Iran. On August 16, 2010, Treasury's Office of Foreign Assets Control ("OFAC") published a final rule implementing certain aspects of CISADA, and on October 5, 2011, FinCEN published a final rule to implement section 104(e) of CISADA to complement Treasury's ongoing efforts to protect the international financial system from abuse by Iran.

As a result of the strengthened U.S. sanctions and similar measures taken by the United Nations and other members of the global community, Iran now faces significant barriers to conducting international transactions. In response, Iran has used deceptive financial practices to disguise both the nature of transactions and its involvement in them in an effort to circumvent sanctions. This conduct puts any financial institution involved with Iranian entities at risk of unwittingly facilitating transactions related to terrorism, proliferation, or the evasion of U.S. and multilateral sanctions. Iranian financial institutions, including the Central Bank of Iran ("CBI"), and other state-controlled entities, willingly engage in deceptive practices to disguise illicit conduct, evade international sanctions, and undermine the efforts of responsible regulatory agencies around the world.

Iranian financial institutions: Iran employs numerous deceptive practices to disguise the Iranian origin of transactions in order to avoid scrutiny and evade international sanctions. These practices include the transfer of funds from Iran to exchange houses outside Iran and the use of back-to-back letters of credit. Iranian foreign bank branches transfer funds to local banks in the same jurisdiction for onward payments that may conceal the Iranian origin of funds.

In other examples, Bank Sepah has requested that its name be removed from transactions in order to make it more difficult for intermediary financial institutions to determine the true parties to a transaction. As noted in Treasury's designation, Bank Melli took precautions not to identify Bank Sepah in transactions following Bank Sepah's designation under UNSCR 1747 and employed similar deceptive banking practices to obscure its involvement from non-Iranian financial institutions when handling financial transactions on behalf of the IRGC.

In June 2010, Post Bank of Iran was designated by the Treasury Department under E.O. 13382 for facilitating transactions on behalf of Bank Sepah after Bank Sepah was designated by the UN and United States. The designation further notes that, in 2009, Post Bank facilitated business on behalf of Bank Sepah between Iran's defense industries and overseas beneficiaries and transacted millions of dollars worth of business between U.S.-designated Hong Kong Electronics and other overseas beneficiaries.

The Central Bank of Iran, which regulates Iranian banks, has assisted designated Iranian banks by transferring billions of dollars to these banks in 2011. In mid-2011, the CBI transferred several billion dollars to designated banks, including Saderat, Mellat, EDBI and Melli, through a variety of payment schemes. In making these transfers, the CBI attempted to evade sanctions by minimizing the direct involvement of large international banks with both CBI and designated Iranian banks. Additionally, the CBI transfers funds to designated Iranian bank branches outside Iran via non-Iranian foreign banks, often involving deliberate attempts on its part to conceal that the recipient is a designated Iranian bank. In some cases, this activity involves book-to-book transfers and the use of accounts at intermediary banks that hold accounts for the CBI and

designated banks. Further, the CBI was believed to have provided financing to the UN-sanctioned Khatem al-Anbiya Constructions Headquarters for defense-related projects.

Front companies: Iran has a well-established history of using front companies and complex corporate ownership structures to disguise the involvement of government entities known to be involved in Iranian proliferation activity when conducting commercial transactions. These companies transact substantial business in Iran and elsewhere around the world. For example, Novin, an AEOI front company that operates as the financial arm of AEOI, has transferred millions of dollars on behalf of AEOI to entities associated with Iran's nuclear program. Additionally, Mesbah Energy Company ("Mesbah"), was designated under EO 13382 for being controlled by, or acting or purporting to act for or on behalf of AEOI, and was cited in UNSCR 1737. Mesbah has been used to procure products for Iran's heavy water project. Heavy water is essential for Iran's heavy-water-moderated reactor, which will provide Iran with a potential source of plutonium that could be used for nuclear weapons.

In some cases, the connection to Iran is not readily apparent, as Iranian entities have formed front companies outside of Iran in an attempt to obtain dual-use items for Iran that could be used in Iran's nuclear or missile programs and that otherwise could not legally be exported directly to Iran. For example, Iranian companies and their fronts have also falsified end-user information on export forms to allow prohibited items to be exported into the country. Iran has colluded with some exporters to enter fictitious end-user names in the importer section of export forms in order to evade international and national controls on shipments to Iran. For example, in May 2010, Balli Aviation Ltd., a UK subsidiary of Balli Group PLC, pled guilty in the U.S. District Court for the District of Columbia to exporting three Boeing 747 aircraft to Iran without obtaining the proper authorization from the United States.

Iranian commercial entities deploy the above mentioned practices specifically to evade those controls put in place by the United States, international community, and responsible financial institutions, controls that are designed to enforce international sanctions, prevent the proliferation of nuclear weapons and their delivery systems, and protect the international financial sector from abuse by illicit actors. These practices by Iranian entities have allowed Iran to engage in illicit activities and operate undetected in the international economy.

The IRGC: The IRGC, which was designated by the Department of State as a primary proliferator under E.O. 13382 in October 2007, owns and/or controls multiple commercial entities across a wide range of sectors within the Iranian economy. For example, the IRGC established Khatam al-Anbiya, the largest major Iranian construction conglomerate, to generate income and fund IRGC operations while presenting the company as a legitimate company working on civilian projects. Khatam al-Anbiya was designated by Treasury in 2007 pursuant to E.O. 13382. U.S.-designated, Iranian-linked financial institutions have served as an important lifeline for Khatam al-Anbiya. The U.S. and EU-designated Iranian banks Melli, Mellat, and state-owned Iranian Bank Tejarat have provided financial support to Khatam al-Anbiya-related business before and after the UN designation of Khatam al-Anbiya and fourteen of its subsidiaries.

The IRGC has continued to expand its control over commercial enterprises within Iran. For example, Tidewater Middle East Company ("Tidewater"), a port operating company, was designated by Treasury under E.O. 13382 in June 2011 as a company that is owned by the IRGC. Tidewater has operations at seven Iranian ports, some of which the Iranian government has repeatedly used to export arms or related material in violation of UNSCRs. Treasury also designated Iran Air under E.O. 13382 for providing material support to the IRGC and MODAFL,

both of which used the commercial airline carrier to transport military-related equipment on passenger aircraft. Similarly, as noted in Treasury's designation of the leadership within the IRGC-Qods Force ("IRGC-QF"), the IRGC and the IRGC-QF engage in seemingly legitimate activities that provide cover for intelligence operations and support terrorist groups such as Hizballah, Hamas and the Taliban.

Islamic Republic of Iran Shipping Lines ("IRISL"): Treasury designated IRISL, Iran's national maritime carrier, and affiliated entities pursuant to E.O. 13382 for providing logistical services to MODAFL. The concern over IRISL's role in Iran's illicit activities has grown significantly within the international community. In October 2009, the UK and Bermuda also designated IRISL. Three IRISL-related entities, Irano Hind Shipping Company, IRISL Benelux NV, and South Shipping Line Iran (SSL), were sanctioned by the UN in June 2010. Subsequently, the EU, Australia, Canada, Japan, Norway, South Korea, and Switzerland adopted measures against IRISL. Additionally, as IRISL became increasingly unable to maintain adequate hull and protection-and-indemnity (P&I) insurance because of international sanctions, IRISL was forced to turn to Tehran-based Moallem Insurance Company, which was not in the business of providing maritime insurance. Treasury designated Moallem in December 2010 for providing marine insurance to IRISL vessels.

Iran's main shipping line has long relied upon deceptive techniques to conceal its behavior and to avoid international and U.S. sanctions. IRISL is increasingly employing deceptive practices to disguise its involvement in shipping operations and the designation of its cargo. Since being subjected to U.S. and international sanctions, IRISL has renamed as many as 80 of the ships in its fleet and changed ownership information and flag registries to evade sanctions. IRISL also has renamed its offices in China, Singapore, Germany, and South Korea, has tried to mask its operations in the UAE by using a network of front companies, and has moved its container operations to a subsidiary, HDS Lines. Moreover, IRISL has also since stopped referring to HDS Lines in bills of lading from its shipping agent.

These deceptive practices are designed to avoid scrutiny in financial transactions. As the U.S. and other jurisdictions have prohibited financial institutions from processing transactions involving sanctioned entities, IRISL's deceptive practices seek to disguise IRISL's involvement in order to permit the financial transaction. In an advisory to U.S. financial institutions, FinCEN noted IRISL's efforts to rename vessels and adjust information associated with financial transactions and suggested that the International Maritime Organization ("IMO") registration number, which is a unique identifier assigned to each vessel, could provide a useful indication of whether an IRISL vessel is involved in a transaction. In addition, OFAC issued an advisory to alert shippers, importers, exporters, and freight forwarders of IRISL's efforts to hide its involvement in transactions by using container prefixes registered to another carrier, omitting or listing invalid, incomplete or false container prefixes in shipping container numbers, and naming non-existent ocean vessels in shipping documents.

B. The Substance and Quality of Administration of the Bank Supervisory and Counter-Money Laundering Laws of That Jurisdiction

Iran's serious deficiencies with respect to anti-money laundering/countering the financing of terrorism ("AML/CFT") controls has long been highlighted by numerous international bodies and government agencies. Starting in October 2007, the FATF has issued a series of public statements expressing its concern that Iran's lack of a comprehensive AML/CFT regime represents a significant vulnerability within the international financial system. The statements further called upon Iran to address those deficiencies with urgency, and called upon FATF-

member countries to advise their institutions to conduct enhanced due diligence with respect to the risks associated with Iran's deficiencies.

The FATF has been particularly concerned with Iran's failure to address the risk of terrorist financing, and starting in February 2009, the FATF called upon its members and urged all jurisdictions to apply effective countermeasures to protect their financial sectors from the terrorist financing risks emanating from Iran. In addition, the FATF advised jurisdictions to protect correspondent relationships from being used to bypass or evade countermeasures and risk mitigation practices, and to take into account money laundering and financing of terrorism risks when considering requests by Iranian financial institutions to open branches and subsidiaries in their jurisdictions. The FATF also called on its members and other jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with Iran, including Iranian companies and financial institutions. Over the past three years, the FATF has repeatedly reiterated these concerns and reaffirmed its call for FATF-member countries and all jurisdictions to implement countermeasures to protect the international financial system from the terrorist financing risk emanating from Iran. In response, numerous countries, including all G7 countries, have issued advisories to their financial institutions.

The FATF's most recent statement in October 2011 reiterated, with a renewed urgency, its concern regarding Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity to the international financial system. The FATF reaffirmed its February 2009 call to apply effective countermeasures to protect their financial sectors from ML/FT risks emanating from Iran, and further called upon its members to consider the steps already taken and possible additional safeguards or strengthen existing ones. In addition, the FATF stated that, if Iran fails to take concrete steps to improve its AML/CFT regime, the FATF will consider calling on its members and urging all jurisdictions to strengthen countermeasures in February 2012. The numerous calls by FATF for Iran to urgently address its terrorist financing vulnerability, coupled with the extensive record of Iranian entities using the financial system to finance terrorism, proliferation activities, and other illicit activity, raises significant concern over the willingness or ability of Iran to establish adequate controls to counter terrorist financing.

C. Whether the United States Has a Mutual Legal Assistance Treaty With That Jurisdiction, and the Experience of U.S. Law Enforcement Officials and Regulatory Officials in Obtaining Information About Transactions Originating in or Routed Through or to Such Jurisdiction

Iran has not entered into any mutual legal assistance treaties. Additionally, U.S. law enforcement and regulatory officials have found Iran to be uncooperative regarding access to information about financial transactions. Accordingly, Iran remains a safe haven for those who would commit financial crimes against the United States.

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As a consequence of finding Iran to be a jurisdiction of primary money laundering concern, the Treasury Department imposed a special measure against Iran. The Treasury Department's Financial Crimes Enforcement Network ("FinCEN") filed a notice of proposed rulemaking in conjunction with the finding under Section 311. 76 Fed. Reg. 72,878 (Nov. 28, 2011). The State Department fact sheet on the new measures against Iran explained how the special measure against Iran imposed by the proposed rule would build on existing U.S. regulations prohibiting U.S. financial institutions from transacting with Iranian financial

institutions and “require U.S. financial institutions to implement additional due diligence measures in order to prevent any improper indirect access by Iranian banking institutions to U.S. correspondent accounts.” Fact sheet, November 21, 2011, available at www.state.gov/r/pa/prs/ps/2011/11/177609.htm. In a background briefing on the new sanctions, available at www.state.gov/r/pa/prs/ps/2011/11/177613.htm, a senior official in the Obama administration described the broad impact intended by the Section 311 finding and special measure:

... I think the impact is going to be much, much greater with respect to how the international financial community reacts to this act. As I said, this is an authority that we use at the Treasury Department very sparingly. It is an authority that we haven’t used with respect to an entire jurisdiction in many years. And we’ve seen in the past that when we do use this action, foreign financial institutions take it very seriously, and I think it’s going to create a serious chilling effect on the willingness of any foreign financial institution anywhere in the world to ... continue to do business with Iran.

...So I do think that when financial institutions see this action, when they hear the words that Secretary Geithner spoke today about his views about the risks of doing business with Iran of any kind, I do think that they’re going to take this and act accordingly.

I also think that it provides us with a very strong platform for engagement with other countries, ...to have a conversation with them about the steps that they need to take with respect to Iran as a whole and with respect to Iranian entities like the Central Bank of Iran, to show in one place that this is the type of activity that the Central Bank of Iran is engaging in, and then we can have a conversation about what the appropriate next steps with the Central Bank of Iran are.

(2) Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

(i) Energy-related sanctions

On March 29, 2011, the State Department announced sanctions on Belarusneft, a state-owned Belarusian energy company, under the Iran Sanctions Act (“ISA”) of 1996, as amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act (“CISADA”) of 2010, for its involvement in the Iranian petroleum sector. 76 Fed. Reg. 18,821 (Apr. 5, 2011). See *Digest 2010* at 646-53 for a discussion of the energy-related sanctions provisions under ISA as amended by CISADA. A State Department media note, available at www.state.gov/r/pa/prs/ps/2011/03/159309.htm, explained the basis for the sanctions on Belarusneft and the impact of CISADA more broadly:

In a thorough review, the Department confirmed that Belarusneft entered into a \$500 million contract with the NaftIran Intertrade Company in 2007 for the development of the Jofeir oilfield in Iran. The ISA requires that sanctions be imposed on companies that make certain investments over \$20 million.

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Since President Barack Obama signed CISADA into law on July 1, 2010, Iran's ability to attract new investment to develop its oil and natural gas resources, and to produce or import refined petroleum products, has been severely limited. The State Department's direct engagement with companies and governments to enforce CISADA is raising the pressure on the Government of Iran. In the past year, many foreign companies have abandoned their energy-related projects in Iran or have stopped shipping refined petroleum to Iran. This is an appropriate response to Iran's longstanding use of its oil and gas sector to facilitate its proliferation activities and thereby its noncompliance with its nuclear obligations.

On May 23, 2011, President Obama signed Executive Order 13574, "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Sanctions Act of 1996, as Amended." 76 Fed. Reg. 30,505 (May 25, 2011). When the U.S. government determines that a person has engaged in sanctionable activity under the energy sector provisions in ISA, as amended by CISADA, three or more out of nine possible sanctions must be imposed. Executive Order 13574 directs relevant agencies to carry out these sanctions. Section 1(a) of E.O. 13574 is set forth below.

* * * *

(a) When the President, or the Secretary of State pursuant to authority delegated by the President and in accordance with the terms of such delegation, which includes consultation with the Secretary of the Treasury, has determined that sanctions shall be imposed on a person pursuant to section 5 of ISA and has selected the sanctions set forth in section 6 of ISA to impose on that person, the Secretary of the Treasury, in consultation with the Secretary of State, shall take the following actions with respect to the sanctions imposed and maintained by the President or by the Secretary of State pursuant to and in accordance with the terms of such delegation:

- (i) with respect to section 6(a)(3) of ISA, prohibit any United States financial institution from making loans or providing credits to the ISA-sanctioned person consistent with section 6(a)(3) of ISA;
- (ii) with respect to section 6(a)(6) of ISA, prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the ISA-sanctioned person has any interest;
- (iii) with respect to section 6(a)(7) of ISA, prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the ISA-sanctioned person;
- (iv) with respect to section 6(a)(8) of ISA, block all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, including any overseas branch, of the

ISA-sanctioned person, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in; or
(v) with respect to section 6(a)(9) of ISA, restrict or prohibit imports of goods, technology, or services, directly or indirectly, into the United States from the ISA-sanctioned person.

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Effective May 24, 2011, the State Department imposed sanctions pursuant to ISA, as amended by CISADA, on six additional entities (Associated Shipbroking, Petrochemical Commercial Company International, Petr leos de Venezuela S.A., Royal Oyster Group, Speedy Ship, and Tanker Pacific Management (Singapore) Pte. Ltd.) for their activities in support of Iran's energy sector. 76 Fed. Reg. 56,866 (Sept. 14, 2011). In a clarification of the May 24th announcement, sanctions were imposed on two additional entities (Allvale Maritime Inc. and Soci t  Anonyme Mon gasque D'Administration Maritime Et A rienne) effective August 26, 2011. *Id.* OFAC subsequently implemented the sanctions imposed by the State Department in accordance with E.O. 13574. 76 Fed. Reg. 70,544 (Nov. 14, 2011). In a special briefing on these ISA sanctions, available at www.state.gov/r/pa/prs/ps/2011/05/164170.htm, senior U.S. government officials explained the reasoning behind the sanctions.

Security Council Resolution 1929 recognizes a connection between Iran's energy revenues and its nuclear and missile programs. The revenues it acquires through its energy sales do contribute to its proliferation program, so that was recognized internationally as a tie-in. And so ... this is one basis for going after the energy sector. Also, some of the equipment and technology you can acquire for the energy sector's dual use can have applications to certain military programs in Iran, so that's one reason we've gone after that particular sector in Iran. Our evidence, and this comes from reports, from countries that have embassies in Tehran and other anecdotal evidence, suggest that these measures that we have adopted have not adversely impacted the citizens of Iran and that the economic difficulties that exist in Iran, and they are substantial, are primarily the result of the mismanagement of the economy by the Iranian Government.

In addition to imposing sanctions under CISADA, the U.S. engaged in a diplomatic effort to convince other countries to increase the pressure on Iran to comply with its nonproliferation obligations by turning to alternate sources for supply of petroleum products. On December 5, 2011, Special Advisor for Nonproliferation and Arms Control Robert J. Einhorn traveled to South Korea as part of this effort, and remarked:

...[W]e began a diplomatic campaign to encourage purchasers of Iranian petrochemicals around the world, to encourage them to find alternative sources of

petrochemicals, to discontinue their import of petrochemicals from Iran and to find alternative sources of petrochemical supply.

* * * *

And now we're asking our partners all over the world to take additional steps and naturally we are coming to Korea to see what the Republic of Korea can do to sharpen the choice for the leaders of Iran.

Remarks, available at www.state.gov/t/isn/rls/rm/178407.htm.

(ii) Financial sanctions

On October 11, 2011, FinCEN issued a final rule to implement section 104(e) of CISADA. 76 Fed. Reg. 62,607 (Oct. 11, 2011). This final rule complements previous rulemaking to implement CISADA, including Treasury's issuance of the Iranian Financial Sanctions Regulations ("IFSR") in 2010. See *Digest 2010* at 654-55. A fact sheet issued by FinCEN summarized the rule:

The rule issued today requires a U.S. bank, upon request from FinCEN, to inquire of specified foreign banks for which the U.S. bank maintains a correspondent account, and report to the Treasury Department, with respect to whether each foreign bank:

- Maintains a correspondent account for an Iranian-linked financial institution designated under the International Emergency Economic Powers Act (IEEPA);
- Has processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an Iranian-linked financial institution designated under IEEPA, other than through a correspondent account; or
- Has processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, Iran's Islamic Revolutionary Guard Corps (IRGC) or any of its agents or affiliates designated under IEEPA.

Fact sheet dated October 5, 2011, available at www.fincen.gov/news_room/nr/html/20111005.html.

(iii) Human rights sanctions

In February 2011, OFAC issued the Iranian Human Rights Abuses Sanctions Regulations in 31 C.F.R. Part 562, to implement Executive Order 13553, "Blocking Property of Certain Persons With Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions." 76 Fed. Reg. 7695 (Feb. 11, 2011). E.O. 13553 authorizes sanctions

on Iranian officials determined to be responsible for or complicit in serious human rights abuses involving Iran and carries out Section 105(b) of the CISADA. See *Digest 2010* at 656-60 for a discussion of E.O. 13553. On February 23, 2011, OFAC designated two individuals pursuant to E.O. 13553: Abbas Jafari Dolatabadi, Prosecutor General of Iran, and Moahammed Reza Naqdi, head of the Basij Resistance Force ("Basij"). 76 Fed. Reg. 11,313 (Mar. 1, 2011). On June 9, 2011, OFAC designated three entities and one individual (Iran's Islamic Revolutionary Guard Corps ("IRGC"), the Basij, and the Law Enforcement Forces ("LEF," Iran's national police) and its Chief, Ismail Ahmadi Moghadam) pursuant to E.O. 13553. 76 Fed. Reg. 34,805 (June 14, 2011). On December 13, 2011, OFAC designated two individuals (Hassan Firuzabadi, Chairman of the Joint Chiefs of Staff and Abdullah al-Argahi, Islamic Revolutionary Guard Corps Deputy Commander). 76 Fed. Reg. 82,042 (Dec. 29, 2011).

(3) Sanctions under Executive Order 13382

During 2011 the United States imposed targeted financial sanctions on Iranian entities, Iranian individuals and other entities linked to previously designated Iranian entities under Executive Order 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and their Supporters." See 70 Fed. Reg. 38,567 (July 1, 2005); see also *Digest 2005* at 1125-31. The United States relies in part on the authorities in Executive Order 13382 to implement its obligations under the Security Council's resolutions concerning Iran.

On January 13, 2011, OFAC designated 26 entities under E.O. 13382. 76 Fed. Reg. 15,366 (Mar. 21, 2011). The Treasury Department identified two of the entities as subordinates of Iran's Aerospace Industries Organization ("AIO") and the other 24 as affiliates of the Islamic Republic of Iran Shipping Lines ("IRISL"). Both AIO and IRISL had been designated previously under E.O. 13382. See Department of the Treasury press release, available at www.treasury.gov/press-center/press-releases/Pages/tg1022.aspx.

Effective February 1, 2011, OFAC designated an additional seven individuals and seven entities from Iran, Turkey, and Malta under E.O. 13382. 76 Fed. Reg. 22,167 (Apr. 20, 2011). A Treasury Department press release, available at www.treasury.gov/press-center/press-releases/Pages/tg1044.aspx, identified six of the individuals and five of the entities as part of a "multi-million dollar procurement network" led by Iranian Milad Jafari* and used to procure metal products for subordinates of AIO. The remaining individual (Adrian Baldacchino, director of IRISL Malta) and two entities (Royal-Med Shipping Agency Ltd. and Maraner Holdings Limited) were designated for their affiliation with IRISL.

* Editor's note: The Treasury press release also related that, on the same day the Jafari network was designated under E.O. 13382, the Department of Justice announced the unsealing of a July 21, 2010 federal indictment charging Milad Jafari with one count of conspiracy to illegally export materials from the United States to Iran and to defraud the United States; five separate counts of illegal export and attempted illegal export of materials to Iran; and five additional counts of smuggling materials.

Effective February 17, 2011, OFAC designated one Iranian entity, Bank Refah Kargaran (and its aliases). 76 Fed. Reg. 12,414 (Mar. 7, 2011). A Treasury Department press release, available at www.treasury.gov/press-center/press-releases/Pages/tq1067.aspx, explained that Bank Refah was designated for, among other activity, its financial services to facilitate weapons purchases by the Iranian Ministry of Defense and Armed Forces Logistics (“MODAFL”), the arm of the Iranian military that oversees Iran’s ballistic missile program and a previous E.O. 13382 designee (in 2007).

In 2011, OFAC made several additional designations of entities related to, and vessels owned by, IRISL. On March 24, 2011, OFAC designated four vessels and updated information on 10 previously designated IRISL vessels. 76 Fed. Reg. 55,166 (Sep. 6, 2011). On October 27, 2011, OFAC identified one additional vessel as owned by IRISL and updated information on 14 vessels previously designated. 76 Fed. Reg. 72,500 (Nov. 23, 2011). Also on October 27, 2011, OFAC designated six more entities related to IRISL. 76 Fed. Reg. 72,499 (Nov. 23, 2011). Also on October 27, 2011, OFAC supplemented the identifying information for Soroush Sarzamin Asatir Ship Management Company, an entity designated in 2010 under E.O. 13382. 76 Fed. Reg. 72,501 (Nov. 23, 2011). On December 20, 2011, OFAC designated one individual and ten entities (shipping and front companies) affiliated with IRISL. 77 Fed. Reg. 2346 (Jan. 27, 2012).

Effective June 23, 2011, OFAC designated two additional entities, Mehr-E Eqtesad-E Iranian Investment Company and Tidewater Middle East Co. (and their aliases) under E.O. 13382. 76 Fed. Reg. 40,773 (July 11, 2011). Also effective June 23, 2011, OFAC designated Iran Air and Iran Air Tours and their aliases. 76 Fed. Reg. 40,772 (July 11, 2011). A Treasury Department fact sheet, available at www.treasury.gov/press-center/press-releases/Pages/tq1217.aspx, identified the entities as follows: the first entity is owned or controlled by Mehr Bank, a previous designee; Tidewater is “a port operating company owned by Iran’s Islamic Revolutionary Guard Corps (IRGC) that has been used by the IRGC for illicit shipments”; Iran Air is a commercial airline used by the IRGC and MODAFL to transport military related equipment; and Iran Air Tours is Iran Air’s subsidiary.

On November 21, 2011, the State Department designated four Iranian entities (Nuclear Reactors Fuel Company (SUREH), Noor Afzar Gostar Company (NAGCO), Fulmen Group, and Yasa Part, with their aliases) pursuant to E.O. 13382. 76 Fed. Reg. 73,758 (Nov. 29, 2011). A State Department fact sheet, available at www.state.gov/r/pa/prs/ps/2011/11/177608.htm, and excerpted below, explained the basis for the State Department designations and their relation to the International Atomic Energy Agency’s recent conclusions about Iran’s nuclear activities. OFAC also designated one individual and six entities on November 21, 2011, all linked to the Atomic Energy Organization of Iran (AEOI), the main Iranian organization responsible for research and development activities in the field of nuclear technology, which was listed in the Annex to E.O. 13382 and was designated by the UN Security Council in Resolution 1737. The November 21, 2011 designations pursuant to E.O. 13382 were made in conjunction with other measures announced that day directed at Iran. See discussion in Section A.2.b.(1), *supra*.

* * * *

Today, the United States is taking a series of actions to increase pressure on Iran to comply with its full range of international nuclear obligations and to engage in constructive negotiations on the future of its nuclear program. In his report to the International Atomic Energy Agency (IAEA) Board of Governors, which was released to the public last week, the IAEA Director General concluded that Iran has carried out activities relevant to the development of a nuclear explosive device, some of which have continued past 2003. Iran uses a wide network of procurement agents to procure items, equipment, and technology in support of this illicit nuclear program. The actions below target several of these entities involved in Iran's illicit nuclear programs.

As a result of today's actions, U.S. persons are prohibited from engaging in any transactions with today's designees and any assets they may hold under U.S. jurisdiction are frozen.

Department of State Designation of Entities under E.O. 13382:

The new State Department designees are entities that play an important role in Iran's nuclear procurement network. They support a variety of Iran's proscribed nuclear procurement-related activities, including centrifuge development, heavy water research reactor activities, and the uranium enrichment program.

The Nuclear Reactors Fuel Company

The Nuclear Reactors Fuel Company (SUREH) was created in 2009 to oversee Iran's fuel manufacturing facilities and organizations. SUREH is responsible for production of fuel for Iran's nuclear reactors—including the 40-megawatt heavy water research reactor (the IR-40)—and has sought commodities for the reactor's fuel assemblies.

SUREH regularly works with known Iranian procurement agents to acquire needed commodities for the IR-40. The IR-40 is currently under construction at Arak, Iran, and when operational, it will provide Iran the capability to produce plutonium in the reactor's spent fuel, which Iran could choose to reprocess for nuclear weapons. Iran claims the reactor will produce radioisotopes for medical and industrial use and to replace the aging Tehran Research Reactor.

In 2011, the IAEA Board of Governors [BOG] found that, contrary to the relevant resolutions of the BOG and UNSC, Iran has not suspended work on all heavy water-related projects, including the IR-40. SUREH's procurement activities are violations of Iran's NPT, IAEA, and UNSC obligations.

The European Union noted in Council Implementing Resolution 503/2011 (May 23, 2011) that SUREH is a company subordinate to the UN-sanctioned Atomic Energy Organization of Iran (AEOI), consisting of the Uranium Conversion Facility, the Fuel Manufacturing Plant, and the Zirconium Production Plant.

Noor Afzar Gostar Company

The Noor Afzar Gostar Company has been involved in the procurement efforts for materials for both the IR-40 and probably for Iran's uranium enrichment program.

The European Union noted in Council Implementing Resolution 503/2011 (May 23, 2011) that the Noor Afzar Gostar Company is a company that is a subsidiary of the UN-sanctioned AEOI and is involved in the procurement of equipment for the nuclear program.

Fulmen Group

The Fulmen Group was involved in procuring goods for the covert uranium enrichment facility at Qom while the facility was still an undeclared site from 2006 through 2008.

From May 2006 until at least September 2008, Fulmen was involved in many facets of the construction of Qom. Additionally, Fulmen has worked with the U.S.- and UN-designated firm Kalaye Electric on the construction of elements of the Natanz Uranium Enrichment Plant.

The preamble of UNSCR 1929 noted that Iran has not established full and sustained suspension of all enrichment-related and reprocessing activities, as set out in Resolutions 1696, 1737, 1747, and 1803, making Fulmen's activities at both Qom and Natanz a material contribution to those facilities' gas centrifuge plant for uranium enrichment.

Iran has failed to meet the requirements of the IAEA Board of Governors regarding disclosure of activity at Qom, including providing the IAEA with design information and permitting the IAEA to verify that information as required by its Safeguards Agreement and by Modified Code 3.1 of the Subsidiary Arrangement to its Safeguards Agreement. Iran also refuses to provide the IAEA with a chronology of the development of Qom, as requested by the IAEA.

The European Union noted in Council Implementing Resolution 668/2010 (July 26, 2010) that Fulmen was involved in the installation of electrical equipment on the Qom/Frodo site at a time when the existence of the site had not yet been revealed. The EU also noted that Arya Niroom Nik is a shell company used by Fulmen for some of its operations. The EU has also designated Fereydoon Mahmoudian as the Director of Fulmen.

Yasa Part

The European Union noted in Council Implementing Resolution 668/2010 (July 26, 2010) that Yasa Part is a company involved with purchasing materials and technologies necessary to nuclear and ballistic programs.

* * * *

(4) Executive Order 13224 designations

On June 23, 2011, OFAC designated one Iranian individual (Behnam Shahriyari) and one Iranian company (Behnam Shahriyari Trading Company), pursuant to Executive Order 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism." 76 Fed. Reg. 38,279 (June 29, 2011). In a fact sheet dated June 23, 2011, the Treasury Department explained that OFAC designated the individual, and the entity he owned and operated, for acting for or on behalf of an IRGC-linked shipping company previously designated under E.O. 13224." See fact sheet, available at www.treasury.gov/press-center/press-releases/Pages/tq1217.aspx.

On October 11, 2011, OFAC designated five individuals (Mansour Arbabsiar, a U.S. citizen; and Iranians Oasem Soleimani, Hamed Abdollahi, Abdul Reza Shahlai, and Ali Gholam Shakuri) pursuant to E.O. 13224. 76 Fed. Reg. 64,183 (Oct. 17, 2011). A Treasury Department press release, available at www.treasury.gov/press-center/press-releases/pages/tq1320.aspx, explained that the five were connected to a plot to assassinate the Saudi Arabian Ambassador to the United States, Adel Al-Jebeir and were designated for acting for or on behalf of the Islamic Revolutionary Guard Corps-Qods Force ("IRGC-QF"), a previously designated entity.

On October 12, 2011, OFAC designated one additional entity, Mahan Air, pursuant to E.O. 13224. 76 Fed. Reg. 64,427 (Oct. 18, 2011). For additional discussion of Executive Order 13224, see A.4.b. below.

3. Nonproliferation

a. Democratic People's Republic of Korea

(1) Executive Order 13570

On April 18, 2011, President Obama issued Executive Order 13570, "Prohibiting Certain Transactions With Respect to North Korea" ("E.O. 13570"). Acting pursuant to the Constitution and U.S. laws including the International Emergency Economic Powers Act ("IEEPA"), the National Emergencies Act ("NEA") and § 5 of the United Nations Participation Act of 1945, as amended ("UNPA"), the President took this step to address the national emergency declared in Executive Order 13466 of June 26, 2008 and expanded in Executive Order 13551 of August 30, 2010 and to ensure implementation of the import restrictions contained in UN Security Council Resolutions 1718 (2006) and 1874 (2009), and complement the import restrictions provided for in the Arms Export Control Act (22 U.S.C. 2751 *et seq.*). See *Digest 2010* at 624-28 for background on E.O. 13551. Section 1 of E.O. 13570 prohibits imports from North Korea:

Section 1. Except to the extent provided in statutes or in licenses, regulations, orders, or directives that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order, the importation into the United States, directly or indirectly, of any goods, services, or technology from North Korea is prohibited.

Pursuant to E.O. 13570, goods, services, and technology from North Korea may not be imported into the United States, directly or indirectly, without a license from OFAC. This broad prohibition applies to goods, services, and technology from North Korea that are used as components of finished products of, or substantially transformed in, a third country.

On June 20, 2011, OFAC amended the North Korea Sanctions Regulations, 31 C.F.R. Part 510, ("NKSr") to implement E.O. 13570. 76 Fed. Reg. 35,740 (June 20, 2011). The notice in the Federal Register conveyed OFAC's intention to supplement these initial regulations with more comprehensive ones containing "additional interpretive and definitional guidance and additional general licenses and statements of licensing policy."

(2) Executive Order 13551

Executive Order 13551, signed by President Obama on August 30, 2010, targets North Korea's importation and exportation of arms, importation of luxury goods, and other illicit activities, including money laundering, the counterfeiting of goods and currency, bulk cash smuggling, and narcotics trafficking. See *Digest 2010* at 624-28. On April 19, 2011, OFAC

designated one additional entity pursuant to E.O. 13551, Bank of East Land (aka Dongbang Bank). The Department of the Treasury issued a press release, which explained that the bank was designated for its facilitation of weapons-related transactions for, and other support to, Green Pine Associated Corporation, an entity listed in the annex to E.O. 13551. The press release is available at www.treasury.gov/press-center/press-releases/Pages/tq1146.aspx. On February 9, 2011, OFAC amended the Green Pine designation to include additional aliases. See www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20110209.aspx.

(3) Communication to the Committee established pursuant to Resolution 1718

On June 24, 2011, the United States sent a letter to the Chair of the Security Council Committee established pursuant to Resolution 1718 (2006) to inform the Committee of actions taken by North Korea to evade the measures imposed in resolutions 1718 and 1874 (2009). The U.S. letter related that a U.S. Navy ship had hailed a Belize-flagged vessel, *M/V Light*, in May 2011 after it departed North Korea. The U.S. Navy ship acted in accordance with paragraph 12 of resolution 1874 and pursuant to the Proliferation Security Initiative based on reasonable grounds to suspect transport of proliferation-related items. When the U.S. Navy ship's officers attempted to board and inspect the ship with the authorization of Belize, the flag state, *M/V Light*'s master claimed the vessel was a North Korean ship and refused to allow boarding and inspection. The U.S. Navy ship monitored the *M/V Light* and the U.S. alerted other UN Member States to inspect its cargo if it entered their ports. On May 29, the *M/V Light* changed course and returned to North Korea. Based on the suspicious circumstances of this incident, the United States encouraged the Committee to review additional ways to improve enforcement of the prohibitions on illicit shipments by Iran imposed by resolutions 1718 and 1874.

b. Iran

See A.2. supra.

c. Iran, North Korea, and Syria Nonproliferation Act

Effective May 23, 2011, the Department of State imposed sanctions on 14 entities and two individuals under the Iran, North Korea, and Syria Nonproliferation Act, Pub. L. No. 106-178 (2000), as amended ("INKSNA"). 76 Fed. Reg. 30,986 (May 27, 2011). The sanctions affected entities from Belarus (two), China (three), Iran (five), North Korea (one), Syria (two), Venezuela (one), one Chinese national, and one Iranian national. Effective December 20, 2011, the Department of State imposed sanctions on seven entities and one individual under INKSNA. 76 Fed. Reg. 81,004 (December 27, 2011). The sanctions affected entities from Belarus (one), China (two), Iran (two), North Korea (one), Syria (one), and one Chinese national. The Federal Register notices in May and December included identical language explaining the basis for imposing sanctions:

A determination has been made that a number of foreign entities ... have engaged in activities that warrant the imposition of measures pursuant to Section 3 of the Iran, North Korea, and Syria Nonproliferation Act. The Act provides for penalties on entities and individuals for the transfer to or acquisition from Iran since January 1, 1999, the transfer to or acquisition from Syria since January 1, 2005, or the transfer to or acquisition from North Korea since January 1, 2006, of equipment and technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists.

The notices also set forth the sanctions, which were imposed for a period of two years:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of any goods, technology, or services from these foreign persons, except to the extent that the Secretary of State otherwise may have determined;
2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government, except to the extent that the Secretary of State otherwise may have determined;
3. No United States Government sales to the foreign persons of any item on the United States Munitions List are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and
4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

d. Executive Order 13382

On August 10, 2011, OFAC designated two entities (Commercial Bank of Syria and Syrian Lebanese Commercial Bank) pursuant to E.O. 13382, “Blocking Property of Weapons of Mass Destruction Proliferators and their Supporters.” 76 Fed. Reg. 50,813 (Aug. 16, 2011). All other E.O. 13382 designations in 2011 relate to Iran and are described in Section A.2.b.(3) above.

e. Modification of sanctions and assistance restrictions

Effective July 18, 2011, the Department of State lifted measures imposed on one individual (Shah Hakim Shahnazim Zim) sanctioned in 2009 for his involvement in the A.Q. Khan nuclear proliferation network. 76 Fed. Reg. 42,159 (July 18, 2011); see *Digest 2009* at 602-3.

Effective November 7, 2011 the Department of State terminated sanctions imposed on Gerhard Merz pursuant to the Arms Export Control Act. 76 Fed. Reg. 68,809 (November 7, 2011).

f. UN Nonproliferation Sanctions

On April 20, 2011, the United Nations Security Council unanimously adopted Resolution 1977, extending the mandate of the Committee established pursuant to Resolution 1540 by 10 years. U.N. Doc S/RES/1977(2011). Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, provided the following statement on the adoption of Resolution 1977, available at <http://usun.state.gov/briefing/statements/2011/161363.htm>:

Today, with the adoption of Resolution 1977, the United Nations Security Council has taken a firm and unanimous stand against the proliferation of weapons of mass destruction. The threat of these dangerous weapons—especially in the hands of the non-state actors who are determined to acquire them—is just as serious today as it was in 2004, when the Council first enforced effective nonproliferation and counterterrorism measures. Today’s action sharpens the tools of the UN’s 1540 Committee, which helps states build their capacity to address these challenges. It provides the committee with a group of experts and additional technical assistance. And it extends by 10 years the committee’s mandate. The United States fully supports these efforts in our tireless pursuit of a world in which all people are free from nuclear threats.

In the two years since President Obama laid out his vision for a world without nuclear weapons in Prague, the United States has pursued an aggressive non-proliferation agenda at the United Nations. These efforts have yielded concrete successes—from President Obama’s leadership of the Security Council when it adopted Resolution 1887 in 2009 to the consensus outcome at the nuclear nonproliferation treaty (NPT) review conference in 2010—actions that have strengthened the world’s ability to curb the spread of dangerous weapons and to sanction those who violate their

international obligations. Today's action is a significant next step—for the United States and for all who are working toward a more peaceful, secure world.

4. Terrorism

a. Security Council 1267 sanctions

On June 17, 2011, the Security Council adopted Resolution 1988 in which it determined that those individuals and entities affiliated with the Taliban should no longer be included in the consolidated list maintained pursuant to Resolution 1267, but should be listed separately. U.N.Doc. S/RES/1988. Accordingly, the committee established pursuant to Resolution 1267 was renamed as the 1267/1988 (Al-Qaida) sanctions committee and a separate committee was established pursuant to Resolution 1988 to maintain the list of individuals and entities associated with the Taliban who are subject to sanctions and to designate for sanctions additional individuals and entities associated with the Taliban in constituting a threat to the peace and security of Afghanistan. See UN Press Release, July 7, 2011, available at www.un.org/News/Press/docs//2011/sc10312.doc.htm. The United States supported the change, as explained by Ambassador Rice in remarks at a Security Council debate on Afghanistan on July 6, 2011:

[W]e champion the Council's decision to split the 1267 sanctions regime and establish distinct sanctions for al-Qaeda and the Taliban. Resolution 1988 is an important tool for promoting reconciliation while isolating extremists and it sends a clear message to the Taliban: there is a future for those willing to rejoin the fold of peaceful Afghan society.

Remarks available at <http://usun.state.gov/briefing/statements/2011/167689.htm>.

On the same day, the Security Council adopted Resolution 1989, reaffirming the application of sanctions to individuals and entities associated with al-Qaida, including those previously on the 1267 Consolidated List as well as future designees. The U.S. Mission to the UN explained the significance of the resolution in a June 17 fact sheet, excerpted below and available at <http://usun.state.gov/briefing/statements/2011/166473.htm>.

* * * *

- The new 1267 resolution expands the mandate of the 1267 Ombudsperson, whose Office was established in UNSCR 1904 (2009) to help the 1267 Committee consider requests to delist individuals and entities.
- For the first time ever, the Ombudsperson will be able to make recommendations to the Committee whether to accept or reject a delisting request.
- If the Ombudsperson recommends against retaining a listing, then that listing will be removed unless the Committee decides by consensus to retain it, although the question can be submitted to the Security Council.

* * * *

- The resolution enhances the Security Council's ongoing efforts to refine and improve procedures used to add and remove people to the 1267 list.
- The state that initially requested a name be added to the sanctions list may request the name be removed at any time; upon such a request, the listing will be automatically removed unless the Committee decides otherwise, although the question can also be submitted to the Security Council.

* * * *

For background on the establishment of the office of the ombudsperson of the 1267 committee, see *Digest 2009* at 608-10. Prior to passage of Resolution 1989, six requests for delisting had been presented to the ombudsperson in 2011, including some requests pertaining to multiple entities and individuals. After passage of Resolution 1989, nine additional requests for delisting were presented in 2011. Nine of those 15 cases resulted in delisting and one resulted in an amendment to the listing, based on the ombudsman's recommendation and the acquiescence of the 1267 committee. Five of the cases submitted in 2011 have yet to be determined. Information about the status of cases considered by the ombudsperson is available at www.un.org/en/sc/ombudsperson/status.shtml.

During 2011, the 1267/1989 Committee updated its list by adding new names of individuals and entities subject to the sanctions regime and removing others pursuant to the procedures and criteria established by the Security Council. The United States continued to express its strong support for the 1267/1989 sanctions regime. For example, in response to one addition to the Al-Qaida list on July 29, 2011, Ambassador Rice stated:

The United States welcomes today's decision by the Security Council's Al Qaida Sanctions Committee (the 1267 Committee) to add the terrorist group Tehrik-E-Taliban Pakistan (TTP) to its sanctions list. Today's action sends a strong message to those who support and finance terrorism, and reinforces U.S. efforts to disrupt, dismantle and defeat Al Qaida.

In addition to attacks against the people of Pakistan, TTP has carried out several notorious terrorist attacks against United States interests, including a December 2009 attack on a U.S. military base in Afghanistan and an April 2010 bombing against the U.S. Consulate in Peshawar. The group also claimed responsibility for the failed Times Square bombing plot in 2010. The United States designated TTP as a Foreign Terrorist Organization in September 2010.

We encourage the 1267 Committee to continue its vigilance in designating groups that commit acts of terrorism worldwide.

Remarks available at <http://usun.state.gov/briefing/statements/2011/169254.htm>.

b. U.S. targeted financial sanctions implementing Resolution 1267 and other Security Council resolutions on terrorism

(1) Overview

The United States implements its counterterrorism obligations under UN Security Council Resolution 1267 (1999), subsequent UN Security Council resolutions concerning al-Qaida/Taliban sanctions including Resolution 1988 (2011) and 1989 (2011), and Resolution 1373 (2001) through Executive Order 13224 of September 24, 2001. Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the executive order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for working for or on behalf of, providing support to, or having other links to, persons designated under the executive order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

The United States had previously made some Taliban sanctions designations pursuant to a separate executive order (E.O. 13129) and accompanying OFAC-administered sanctions regulations. For a discussion of E.O. 13129, see *Digest 1991–99* at 1964–67. However, Executive Order 13268, issued by President George W. Bush in 2002, terminated E.O. 13129 and amended E.O. 13224 to include references to those sanctioned under E.O. 13129. See *Digest 2002* at 882–84. In 2011, OFAC revoked the Taliban Sanctions Regulations, leaving Taliban sanctions to be covered by its Global Terrorism Sanctions Regulations and E.O. 13224. 76 Fed. Reg. 31,470 (June 1, 2011).

(2) Department of State

In 2011, the Department of State announced the Secretary of State’s designation of five entities and 16 individuals (including their known aliases) pursuant to E.O. 13224, as follows: Qari Hussain (76 Fed. Reg. 3931 (Jan. 21, 2011)); Sect of Revolutionaries (76 Fed. Reg. 10,634 (Feb. 25, 2011)); Miguel de Garikoitz Aspiazub Rubina (76 Fed. Reg. 16,652 (Mar. 24, 2011)); Jose Ignazio Reta de Frutos (76 Fed. Reg. 16,652 (Mar. 24, 2011)); Ibrahim Hassan Tali al-Asiri (76 Fed. Reg. 17,735 (Mar. 30, 2011)); Budruddin Haqqani (76 Fed. Reg. 28,299 (May 16, 2011)); Army of Islam (76 Fed. Reg. 29,812 (May 23, 2011)); Caucasus Emirate (76 Fed. Reg. 30,987 (May 27, 2011)); Othman al-Ghamdi (76 Fed. Reg. 35,938 (June 20, 2011)); Mumtaz Dughmush (76 Fed. Reg. 52,044 (Aug. 19, 2011)); Sangeen Zadran (76 Fed. Reg. 52,044 (Aug. 19, 2011)); Indian Mujahideen (76 Fed. Reg. 58,076 (Sep. 19, 2011)); Muhammed Hisham Muhammed Isma’il Abu Ghazala (76 Fed. Reg. 58,853 (Sep. 22, 2011)); Jurdan Martitegui Lizaso (76 Fed. Reg. 59,768 (Sep. 27, 2011)); Ibrahim ‘Awwad Ibrahim ‘Ali al-Badri (76 Fed. Reg. 62,494 (Oct. 7, 2011)); Conspiracy of Fire Nuclei (76 Fed. Reg. 63,702 (Oct. 13, 2011)); Mali Khan (76 Fed. Reg. 69,318 (Nov. 8, 2011)); Ibrahim Suleiman Hamad al-Hablain (76 Fed. Reg. 73,760 (Nov. 29, 2011)); Jose Antonio Urruticoechea Bengoechea (AKA Ternera) (76 Fed. Reg. 78,716 (Dec. 19, 2011)); Saleh al-Qarawi (76 Fed. Reg. 78,717 (Dec. 19, 2011)).

During 2011 the Security Council’s 1267/1989 Committee added three of these

individuals and one of these entities to its al-Qaida list (Ibrahim 'Awwad Ibrahim 'Ali al-Badri, Ibrahim Hassan Tali al-Asiri, Othman al-Ghamdi, and Caucasus Emirate,). The Committee also added one individual and one entity that had been designated by the State Department in 2011 (Doku Umarov and Tehrik-e Taliban Pakistan). See www.un.org/sc/committees/1267/index.shtml. The new 1988 Committee added two of the individuals designated by the State Department in 2011 to its list (Sangeen Zadran and Budruddin Haqqani). See www.un.org/sc/committees/1988/.

On October 24, 2011, Secretary Clinton determined that Shamil Salmanovich Basayev and Imad Fa'iz Mughniyah no longer met the criteria for designation under E.O. 13224 and revoked their previous designations. 76 Fed. Reg. 69,318 (Nov. 8, 2011); 76 Fed. Reg. 73,760 (Nov. 29, 2011).

(3) OFAC

(i) OFAC designations

OFAC designated 31 individuals (including their known aliases) and two entities pursuant to Executive Order 13224 during 2011. The designated individuals and entities typically are owned or controlled by, act for or on behalf of, or provide support for or services to individuals or entities the United States has designated as terrorist organizations pursuant to the order. See 76 Fed. Reg. 9073 (Feb. 16, 2011) (two individuals); 76 Fed. Reg. 37,891 (June 28, 2011) (four individuals); 76 Fed. Reg. 38,279 (June 29, 2011) (one individual and one entity); 76 Fed. Reg. 46,896 (Aug. 3, 2011) (six individuals); 76 Fed. Reg. 54,535 (Sep. 1, 2011) (three individuals); 76 Fed. Reg. 59,488 (Sep. 26, 2011) (three individuals); 76 Fed. Reg. 61,776 (Oct. 5, 2011) (five individuals); 76 Fed. Reg. 61,777 (Oct. 5, 2011) (two individuals); 76 Fed. Reg. 64,183 (Oct. 17, 2011) (five individuals); 76 Fed. Reg. 64,427 (Oct. 18, 2011) (one entity).

During 2011 the Security Council's 1267 Committee added seven of these individuals to its Consolidated List (Khalil Haqqani, Said Jan 'Abd Al-Salam, Muhammed Jibril Abdul Rahman, Abdul Rahim Ba'Asyir, Umar Patek, 'Abd al-Rahman Ould Muhammad al-Husayn Ould, Muhammad Jibril Abdul Rahman). See www.un.org/sc/committees/1267/index.shtml.

(ii) OFAC de-listings

In 2011, OFAC determined that six individuals, who had been designated pursuant to E.O. 13224, should be removed from the Treasury Department's list of Specially Designated Nationals and Blocked Persons. 76 Fed. Reg. 16,855 (Mar. 25, 2011) (one individual); 76 Fed. Reg. 63,352 (Oct. 12, 2011) (three individuals); 76 Fed. Reg. 69,318 (Nov. 8, 2011) (one individual); 76 Fed. Reg. 73,781 (Nov. 29, 2011) (one individual). See also A.2.b. *supra*. The 1267 Committee previously removed two of the individuals (Moumou, Pitono) from its Consolidated List.

c. Countries not cooperating fully with antiterrorism efforts

On May 11, 2011, James B. Steinberg, Deputy Secretary of State, acting on delegated authority, determined and certified to Congress pursuant to § 40A of the Arms Export Control Act, 22 U.S.C. § 2781, and Executive Order 11958, as amended, that Cuba, Eritrea, Iran, the Democratic People's Republic of Korea ("DPRK" or "North Korea"), Syria, and Venezuela were not cooperating fully with U.S. counterterrorism efforts. 76 Fed. Reg. 31,390 (May 31, 2011). For information concerning the prohibition on U.S. assistance and the export controls that these designations trigger, see *Cumulative Digest 1991-99* at 508 or *Digest 2003* at 167.

d. Foreign terrorist organizations

In 2011, the Secretary of State continued to designate additional entities as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act, as amended. See Chapter 3.B.1.c.(2) for a discussion of the designations and other related developments in 2011. Many of the organizations the Secretary of State has designated as FTOs also have been designated pursuant to Executive Order 13224. Designated FTOs and their agents are subject to a variety of measures, including financial sanctions. See www.state.gov/j/ct/rls/other/des/123085.htm for background on the applicable sanctions and other legal consequences of designation as an FTO.

e. Possibility of Adding Venezuela to List of State Sponsors of Terrorism

On June 24, 2011, Ambassador Daniel Benjamin, Coordinator for Counterterrorism at the U.S. Department of State, testified at a joint U.S. House of Representatives subcommittee hearing on Venezuela's "sanctionable activity." Ambassador Benjamin's testimony is available at <http://foreignaffairs.house.gov/112/ben062411.pdf>. Portions of the testimony reprinted below discuss Venezuela's relationship with terrorist regimes and the possibility of designating Venezuela as a "State Sponsor of Terrorism."

* * * *

The Administration has significant concerns about connections between members of the Venezuelan government and U.S.-designated terrorist organizations such as the FARC, ELN, and ETA (Basque Fatherland and Liberty), all of which have been reported on in the press. As we have reported in the past, Hizballah has a presence in Venezuela, and the Department of the Treasury has done much to highlight these connections. ...

Since coming to power in 1999, Hugo Chavez has chosen to develop close relations with Iran and Syria. Venezuela is Iran's closest political ally in the Western Hemisphere and President Chavez continues to define Iran as a "strategic ally." This close and highly publicized bond has led to public declarations to establish broad economic, military, and political cooperation,

although the extent of and accomplishments associated with such cooperation appear much less substantive.

Venezuela is required to fulfill its obligations under UN Security Council Resolutions 1373 and 1540, which form part of the legal basis of international counterterrorism efforts. These resolutions, adopted under Chapter VII of the UN Charter, require all states, including Venezuela, to take a series of measures to combat terrorism and prevent WMD and their means of delivery from getting into the hands of terrorists. It is our view that Venezuela has not done enough in this regard.

We would like to outline the significant and effective steps that the U.S. government has already taken to confront specific actions and activities by Venezuela and by Venezuelan officials. For the last five years, since May 2006, pursuant to section 40A of the Arms Export Control Act, Venezuela has been listed as a “Not Fully Cooperating With U.S. Antiterrorism Efforts” country, because of its inadequate response to our counterterrorism efforts. The effect of this listing is a prohibition against the sale or licensing for export to Venezuela of defense articles or services. The United States has also imposed an arms embargo on Venezuela since 2006, which ended all U.S. commercial arms sales and re-transfers to Venezuela. This sanction is a useful tool in signaling we are not satisfied with Venezuela’s counterterrorism cooperation, and has been used in situations where a state may not meet the high threshold for designation as an SST [State Sponsor of Terrorism].

* * * *

...[W]e remain concerned about Venezuela’s commitment to fighting terrorism, and we continue to consider all options in applying appropriate sanctions. One option available to us is the State Sponsor of Terrorism designation. The Department of State has a rigorous legal threshold in exercising its authority to make State Sponsor of Terrorism designations. Since 1979, the following countries have been placed on the SST list: Cuba, Libya, Iran, Iraq, North Korea, South Yemen, Sudan, and Syria. Of these, Cuba, Iran, Sudan, and Syria remain on the list today. The last time the Secretary of State used this authority was in 1993 when Sudan was added to the list.

Before designating a country as a State Sponsor of Terrorism, the Secretary must determine that the government of the country has repeatedly provided support for acts of international terrorism. Before making such a determination, information related to a government’s possible support towards terrorism is carefully reviewed to ensure that there is both credible and corroborated evidence of a government’s repeated support for acts of international terrorism. We believe this is a necessary step before we utilize one of the U.S. government’s broadest sanction tools. If we make decisions to designate states based on anything less, we would be setting the bar too low for future additions to the list. A lower threshold could possibly lead to additions to the list but some of these changes would be inimical to our foreign policy, economic, and counterterrorism interests.

* * * *

5. Armed Conflict: Restoration of Peace and Security

a. Democratic Republic of the Congo

On October 5, 2011 OFAC designated one individual pursuant to Executive Order 13413, of October 27, 2006, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo." 76 Fed. Reg. 63,347 (Oct. 12, 2011); see also 71 Fed. Reg. 64,105 (Oct. 31, 2006); *Digest 2006* at 996–98. The individual was identified as Jamil Mukulu, Head of the Allied Democratic Forces. The Security Council's DRC Sanctions Committee added Mukulu to its list of individuals and entities subject to the UN Security Council's asset freeze and travel ban on October 12, 2011. See www.un.org/sc/committees/1533/index.shtml. On November 30, 2011, OFAC designated another individual pursuant to E.O. 13413, Ntabo Ntaberi Sheka, Commander in Chief of the Nduma Defense of Congo, Mai Mai Sheka Group. 76 Fed. Reg. 76,219 (Dec. 6, 2011). The Security Council's DRC Sanctions Committee added Sheka to its list of individuals and entities that are subject to the UN Security Council's asset freeze and travel ban on November 28, 2011. See www.un.org/sc/committees/1533/index.shtml. In a joint press release, the missions to the United Nations of France, the United Kingdom and the United States—the countries responsible for submitting Sheka's name to the sanctions committee—provided background on his activity:

Ntabo Ntaberi Sheka, born in 1976 in Walikale Territory, Democratic Republic of the Congo, is the Commander in Chief of the political branch of the Mai-Mai Sheka, a Congolese armed group that impedes the disarmament, demobilization, or reintegration of combatants. It operates from bases in Walikale territory in eastern DRC.

The Mai-Mai Sheka group has carried out attacks on mines in eastern DRC, including taking over the Bisiye mines and extorting from locals.

Ntabo Ntaberi Sheka has also committed serious violations of international law involving the targeting of children. Ntabo Ntaberi Sheka planned and ordered a series of attacks in Walikale territory from July 30 to August 2, 2010 to punish local populations accused of collaborating with Congolese government forces. In the course of the attacks, children were abducted, raped, subjected to forced labor and other human rights abuses. The Mai-Mai Sheka militia group also forcibly recruits boys and holds children in their ranks from recruitment drives.

Press release, November 29, 2011, available at <http://usun.state.gov/briefing/statements/2011/177846.htm>

b. Iraq

On May 17, 2011, President Obama continued the national emergency declared by Executive Order 13302 with respect to the stabilization of Iraq. 76 Fed. Reg. 29,141 (May 19, 2011); Daily Comp. Pres. Docs., 2011 DCPD No. 00360. E.O. 13302 protects the

Development Fund for Iraq and certain other property in which Iraq has an interest. In the Notice continuing the national emergency declared in E.O. 13302, President Obama stated:

Because the obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared in Executive Order 13303, as modified in scope and relied upon for additional steps taken in Executive Orders 13315, 13350, 13364, and 13438, must continue in effect beyond May 22, 2011. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to the stabilization of Iraq.

c. *Sudan*

On December 8, 2011, OFAC issued a final rule amending the Sudanese Sanctions Regulations (“SSR”) to authorize activities related to the petroleum and petrochemical industries in the newly-created Republic of South Sudan. 76 Fed. Reg. 76,617 (Dec. 8, 2011). At the same time, OFAC also made other amendments, summarized in the notice in the Federal Register:

OFAC also is amending an existing general license to broaden its authorization with respect to the importation of certain Sudanese-origin services and to add an authorization for activities related to Sudanese persons’ travel to the United States. Finally, OFAC is making certain technical changes to the SSR, including changes to reflect the establishment of the independent state of the Republic of South Sudan and the separation of the Government of the Republic of South Sudan from the Government of Sudan.

d. *Eritrea*

On December 5, 2011, acting pursuant to Chapter VII of the UN Charter, the Security Council adopted Resolution 2023 imposing additional sanctions on Eritrea. U.N. Doc. S/RES/2023. The Council noted with concern the findings of the Somalia/Eritrea Monitoring Group report in 2011 that Eritrea continued to provide support to terrorist groups, including Al-Shabaab, and that a terrorist attack had been planned to disrupt the African Union summit in Addis Ababa in 2011. In remarks to the press following adoption of the new resolution, excerpted below, Ambassador Rice welcomed the action. Ambassador Rice’s remarks are available at <http://usun.state.gov/briefing/statements/2011/178292.htm>.

The United States is pleased with the adoption today of Resolution 2023, imposing additional sanctions on Eritrea for its failure to comply with its obligations under

previous Security Council resolutions, including 1907, passed two years ago this month.**

This resolution underscores the international community's condemnation of Eritrea's destabilizing behavior in the Horn and its support for terrorism. It strengthens the provisions of 1907 and imposes additional obligations on Eritrea and limits its ability to continue to use the mining sector and the diaspora tax to fund its illicit activities.

Ambassador Rice provided further background on the new resolution in her explanation of the United States' vote on Resolution 2023, excerpted below and available at <http://usun.state.gov/briefing/statements/2011/178287.htm>.

* * * *

The United States welcomes the Council's decision to impose new sanctions on Eritrea. Today we have sent a clear message to the Government of Eritrea that it must cease all illegal actions threatening international peace and stability in the Horn of Africa.

As we adopt this resolution, we should recall the events that led us to this decision. Exactly two years ago this month, the Council adopted Resolution 1907 in response to a disturbing pattern of behavior: Eritrea was not engaging constructively in resolving its border dispute with Djibouti, and, most alarmingly, it was providing political, financial and logistical support to armed groups seeking to undermine peace in Somalia. The Council imposed targeted sanctions on Eritrea to demonstrate that Eritrea's actions were unacceptable and would have negative consequences.

Mr. President, that was two years ago. What has happened since? As we heard again this morning, we have continually received evidence of Eritrean support for extremist groups in the region. Eritrea still has not resolved its border dispute with Djibouti. The UN's Somalia and Eritrea Monitoring Group has documented Eritrea's support for terrorism, including an appalling, planned attack on the January 2011 African Union Summit in Addis Ababa. According to the monitoring group, Eritrea is financing all of these activities through illicit means, including threats and the extortion of a "diaspora tax" from people of Eritrean descent living overseas.

In direct response, this Council has today imposed tougher sanctions. Our goal is to show Eritrea that it will pay an ever higher price for its actions. Building on Resolution 1907, this resolution imposes new obligations on Eritrea, including to cease illicit practices to extort funds from its diaspora.

We particularly welcome the Council's expression of concern over the potential use of mining revenues to fund violations of Security Council resolutions. The United States will work with Somalia, the Somalia and Eritrea Monitoring Group, and the Somalia and Eritrea Sanctions Committee to develop voluntary guidelines for companies from the United States and other Member States. Such guidelines can provide useful advice, best practices and information to help companies protect themselves from inadvertently contributing to Eritrea's violations. We intend to draw on this work in advising our own companies.

** Editor's note: For discussion of Resolution 1907, UN Doc. S/RES/1907, see *Digest 2009* at 613-15.

In addition to the obligations set forth in this and previous UN resolutions, today's resolution, 2023, provides further opportunities for Eritrea to show its good faith, including through releasing information on the status of Djiboutian combatants missing in action since June 2008. Eritrea must cease all direct and indirect efforts to destabilize States, particularly through support for armed opposition and terrorist groups, and it should cooperate fully with the Somalia and Eritrea Monitoring Group.

Mr. President, we hope this tightening of sanctions will finally convince the Government of Eritrea to reorder its priorities. The United States believes that the international community's concerns can and should be resolved through political engagement and dialogue. But Eritrea must clearly and affirmatively prove—not through its words but through its actions—that it is ready to reemerge as a law-abiding state. Until that time, the Council and UN Member States are committed to enforcing robustly the sanctions we have applied. We hope that Eritrea does not squander this second chance to change course.

* * * *

e. Somalia

(1) Security Council

On July 29, 2011, acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 2002. U.N. Doc. S/RES/2002. The resolution concerns the Security Council's Somalia arms embargo sanctions regime and authorizes the sanctions committee established pursuant to Resolution 1844 to list additional individuals and entities for sanctions if they are designated:

- (a) as engaging in or providing support for acts that threaten the peace, security or stability of Somalia, including acts that threaten the Djibouti Agreement of 18 August 2008 or the political process, or threaten the TFIs or AMISOM by force;
- (b) as having acted in violation of the general and complete arms embargo reaffirmed in paragraph 6 of resolution 1844 (2008);
- (c) as obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;
- (d) as being political or military leaders recruiting or using children in armed conflicts in Somalia in violation of applicable international law;
- (e) as being responsible for violations of applicable international law in Somalia involving the targeting of civilians including children and women in situations of armed conflict, including killing and maiming, sexual and gender-based violence, attacks on schools and hospitals and abduction and forced displacement;

U.N. Doc S/RES/2002, Para. 1.

(2) *Executive Order 13536*

On July 29, 2011, OFAC designated two individuals pursuant to Executive Order 13536, “Blocking Property of Certain Persons Contributing to the Conflict in Somalia.” 76 Fed. Reg. 47,646 (Aug. 5, 2011) and 76 Fed. Reg. 47,647 (Aug. 5, 2011); see also 75 Fed. Reg. 19,869 (Apr. 15, 2010), *Digest 2010* at 687-90. The individuals were identified as Omar Hammami, a U.S. citizen, and Hassan Mahat Omar of Kenya. The Federal Register notice designating Hammami included the following description of his activities:

Omar Hammami is one of Al-Shabaab’s key figures, who has commanded guerilla forces in combat, organized attacks, and plotted strategy with Al Qaeda. Omar Hammami’s roles in Al-Shabaab include those of a military tactician, recruitment strategist and financial manager. Omar Hammami is featured in an Al-Shabaab video in which militia members are shown training and explicitly stating their allegiance to Osama bin Laden, in what appeared to be an attempt to increase recruiting among Somalis, including Somali émigrés in the United States. Omar Hammami was involved in organizing a suicide bombing attack carried out by a Somali-American from Minnesota who traveled to Somalia to join Al-Shabaab. That attack and four others organized by Omar Hammami and carried out on October 28, 2008, killed more than 20 people. Omar Hammami, a U.S. citizen, has been indicted in the Southern District of Alabama on a three-count indictment for allegedly providing material support, including himself as personnel, to terrorists; conspiring to provide material support to a designated foreign terrorist organization, Al-Shabaab; and providing material support to Al-Shabaab.

76 Fed. Reg. 47,646.

6. Threats to Democratic Processes

a. *Syria*

In 2011, acting pursuant to the International Emergency Economic Powers Act (“IEEPA”), the National Emergency Act, and 3 U.S.C. § 301, President Obama issued three executive orders responding to the Government of Syria’s repression of the Syrian people. On April 29, 2011, he signed Executive Order 13572, “Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria.” 76 Fed. Reg. 24,787 (May 3, 2011). E.O. 13572 includes the President’s finding that:

...the Government of Syria’s human rights abuses, including those related to the repression of the people of Syria, manifested most recently by the use of violence and torture against, and arbitrary arrests and detentions of, peaceful protestors by police, security forces, and other entities that have engaged in human rights abuses, constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States...

Section 1 of E.O. 13572 blocks property of the persons identified in the annex and authorizes the Treasury Secretary to make subsequent designations of persons involved in human rights abuses in Syria.

On May 4, 2011, OFAC provided additional identifying information for the three individuals (Lt. Col. Mahir Al-Asad of the Syrian Army's 4th Armored Division, Maj. Gen. Ali Mamluk of the General Intelligence Directorate, and Brigadier General Atif Najib of the Syrian Political Security Directorate for Dar'a Province) and two entities (the IRGC-Qods Force of Syria and the Syrian General Intelligence Directorate) listed in the Annex to E.O. 13572. 76 Fed. Reg. 27,377 (May 11, 2011). On August 10, 2011, OFAC designated an additional entity (Syriatel) pursuant to E.O. 13572. 76 Fed. Reg. 54,534 (Sep. 1, 2011)

On May 18, 2011, President Obama signed Executive Order 13573, "Blocking Property of Senior Officials of the Government of Syria." 76 Fed. Reg. 29,143 (May 20, 2011). President Obama acted in response to "the Government of Syria's continuing escalation of violence against the people of Syria—including through attacks on protestors, arrests and harassment of protestors and political activists, and repression of democratic change, overseen and executed by numerous elements of the Syrian government." E.O. 13573 blocks property of the persons listed in its annex and any persons subsequently determined by the Treasury Secretary to be, *inter alia*, a senior official or an agency or instrumentality of the Government of Syria, or to be owned or controlled by the Government of Syria or any official of the Syrian Government, or to have provided material assistance or certain types of support for persons whose property is blocked under the order. Those identified in the annex are: President Bashir Al-Assad, Vice President Farouk Al-Shar, Prime Minister Adel Safar, Minister of the Interior Mohammed Ibrahim Al-Shaar, Minister of Defense Ali Habib Mahmoud, Head of Military Intelligence Abdul Fatah Qudsiya, and Director of Political Security Directorate Mohammed Dib Zaitoun.

On August 30, 2011, OFAC designated three individuals pursuant to E.O. 13573: Walid Al-Moallem (Foreign and Expatriates Minister); Bouthaina Shaaban (Presidential Political and Media Advisor); and Ali Abdul Karim Ali (Syrian Ambassador to Lebanon). 76 Fed. Reg. 55,167 (Sep. 6, 2011).

On August 17, 2011, President Obama issued another order blocking property of the Government of Syria, Executive Order 13582, "Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria." 76 Fed. Reg. 52,209 (Aug. 22, 2011). President Obama acted in response to "Syria's continuing escalation of violence against the people of Syria." Section 1 of E.O. 13582 blocks all property of the Government of Syria as well as property of persons subsequently identified by the Treasury Secretary:

- (i) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, any person whose property and interests in property are blocked pursuant to this order; or
- (ii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

At the end of 2011, Treasury had not made any additional designations pursuant to E.O. 13582.

b. Belarus sanctions

On February 1, 2011, OFAC issued a final rule amending the Belarus Sanctions Regulations to revoke a general license that had been granted and extended previously to allow transactions with two blocked entities. 76 Fed. Reg. 5482 (Feb. 1, 2011). On August 11, 2011, OFAC designated four entities pursuant to Executive Order 13405, "Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus." 76 Fed. Reg. 52,384 (Aug. 22, 2011). For discussion of E.O. 13405, see *Digest 2006* at 983-84 and 71 Fed. Reg. 35,485 (June 20, 2006). The Department of State issued a media note describing the new sanctions, which is excerpted below and available at www.state.gov/r/pa/prs/ps/2011/08/170405.htm.

* * * *

Today, the United States imposed additional, new economic sanctions against four major Belarusian state-owned enterprises: the Belshina tire factory; Grodno Azot, which manufactures fertilizer; Grodno Khimvolokno, a fiber manufacturer; and Naftan, a major oil refinery. These four entities have been determined to be owned or controlled by the Belneftekhim conglomerate, an entity already designated under Executive Order 13405. The intent to levy additional sanctions was announced by President Obama on May 27 to respond to the continued incarceration of political prisoners and crackdown on political activists, journalists and civil society representatives. The new sanctions augment the travel restrictions, asset freezes and sanctions announced on January 31. These measures target those responsible for the repression in Belarus following the December 19 presidential elections.

The United States, in concert with our European partners, will continue to monitor developments in Belarus and to take measures to hold accountable those responsible for the repression of fundamental freedoms and the rule of law. These U.S. actions are not directed at the people of Belarus. An integral component of U.S. policy has been to increase support for the people of Belarus as they seek to build a modern, democratic and prosperous society. We reiterate our call on the Government of Belarus to release immediately and unconditionally all political prisoners.

* * * *

c. Zimbabwe

On December 9, 2011, OFAC designated two entities pursuant to E.O. 13469, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 76 Fed. Reg. 78,335 (Dec. 16, 2011); see *Digest 2008* at 800-03. The notice in the Federal Register identified the two entities as being owned by the Zimbabwe Mining Development Corporation, an entity previously designated pursuant to E.O. 13469.

d. Côte d'Ivoire

On March 30, 2011, the Security Council adopted Resolution 1975 imposing targeted sanctions on Laurent Gbagbo and his associates. UN Doc. No. S/RES/1975. The United States had previously designated Gbagbo and those same associates on January 6, 2011 pursuant to Executive Order 13396, "Blocking Property of Certain Persons Contributing to the Conflict in Côte d'Ivoire." 76 Fed. Reg. 2193 (Jan. 12, 2011). See *Digest 2010* at 692 for background on the post-election turmoil in Côte d'Ivoire and the travel restrictions imposed on Gbagbo and his associates in 2010.

e. Modification of Sanctions and Related Actions**(1) Cuba**

On January 14, 2011, President Obama directed the Secretaries of State, Treasury, and Commerce to take steps to continue efforts announced in 2009 to promote democracy and human rights in Cuba by facilitating purposeful contacts between Cubans and Americans. See *Digest 2009* at 635-638 for discussion of the new policy announced in 2009. President Obama directed that changes be made to regulations and policies governing: (1) purposeful travel; (2) non-family remittances; and (3) U.S. airports supporting licensed charter travel from Cuba. A White House press release, excerpted below, and available at www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people, described the steps the President directed the secretaries to take.

* * * *

Purposeful Travel. To enhance contact with the Cuban people and support civil society through purposeful travel, including religious, cultural, and educational travel, the President has directed that regulations and policies governing purposeful travel be modified to:

- Allow religious organizations to sponsor religious travel to Cuba under a general license.
- Facilitate educational exchanges by: allowing accredited institutions of higher education to sponsor travel to Cuba for course work for academic credit under a general license; allowing students to participate through academic institutions other than their own; and facilitating instructor support to include support from adjunct and part-time staff.
- Restore specific licensing of educational exchanges not involving academic study pursuant to a degree program under the auspices of an organization that sponsors and organizes people-to-people programs.
- Modify requirements for licensing academic exchanges to require that the proposed course of study be accepted for academic credit toward their undergraduate or graduate degree (rather than regulating the length of the academic exchange in Cuba).

- Allow specifically licensed academic institutions to sponsor or cosponsor academic seminars, conferences, and workshops related to Cuba and allow faculty, staff, and students to attend.
- Allow specific licensing to organize or conduct non-academic clinics and workshops in Cuba for the Cuban people.
- Allow specific licensing for a greater scope of journalistic activities.

Remittances. To help expand the economic independence of the Cuban people and to support a more vibrant Cuban civil society, the President has directed the regulations governing non-family remittances be modified to:

- Restore a general license category for any U.S. person to send remittances (up to \$500 per quarter) to non-family members in Cuba to support private economic activity, among other purposes, subject to the limitation that they cannot be provided to senior Cuban government officials or senior members of the Cuban Communist Party.
- Create a general license for remittances to religious institutions in Cuba in support of religious activities.

No change will be made to the general license for family remittances.

U.S. Airports. To better serve those who seek to visit family in Cuba and engage in other licensed purposeful travel, the President has directed that regulations governing the eligibility of U.S. airports to serve as points of embarkation and return for licensed flights to Cuba be modified to:

- Allow all U.S. international airports to apply to provide services to licensed charters, provided such airports have adequate customs and immigration capabilities and a licensed travel service provider has expressed an interest in providing service to and from Cuba from that airport.

The modifications will not change the designation of airports in Cuba that are eligible to send or receive licensed charter flights to and from the United States.

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On January 28, 2011, in implementing the President's January 14 statement, the Department of Homeland Security ("DHS") issued a final rule revising DHS regulations to allow additional airports to request approval of U.S Customs and Border Protection ("CBP") to process authorized flights between the United States and Cuba. 76 Fed. Reg. 5054 (Jan. 28, 2011).

Also on January 28, 2011, OFAC issued a final rule amending the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. part 515, to implement the policy changes announced by the President in his January 14 statement. 76 Fed. Reg. 5072 (Jan. 28, 2011). The amendments "allow for greater licensing of travel to Cuba for educational, cultural, religious, and journalistic activities and expand licensing of remittances to Cuba." *Id.* at 5702. They also modify regulations regarding authorization of transactions with Cuban nationals residing outside of Cuba, and make certain technical and conforming changes.

(2) Burma

In December 2011, Secretary Clinton became the first U.S. Secretary of State to visit Burma in 50 years. During her meeting with Burma's president, Secretary Clinton conveyed the willingness of the United States to take modest steps in response to the government of Burma's release of political prisoners and other signs of increased respect for fundamental freedoms. Specifically, Secretary Clinton said that Burma would be invited to be an observer in the Lower Mekong Initiative; that the U.S. would support IMF and World Bank assessment missions to Burma; that the U.S. would support loosening restrictions on UNDP programs in Burma, particularly in the areas of health and microfinance; and that the U.S. would resume joint counter-narcotics missions and the search for missing Americans from World War II. See December 1, 2011 background briefing on Secretary Clinton's meeting with Burmese president, available at www.state.gov/r/pa/prs/ps/2011/12/178025.htm

Secretary Clinton also conveyed that the United States was not prepared to lift sanctions until Burma's government took further steps. She explained that the visit to Burma and the modest steps being taken on the part of the United States toward Burma were the result of an effort over the course of two years to re-engage with Burma and that the process was ongoing. Her answer to questions from the press regarding sanctions in Nay Pyi Taw, Burma, on December 1, 2011 appears below, and is available at www.state.gov/secretary/rm/2011/12/177994.htm.

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With regard to sanctions, we're in the early stages of our dialogue. And I want to state for the record that my visit today is the result of over two years of work on our behalf. We've had at least 20 high-level visits. We have Assistant Secretary Campbell, our former representative Scott Marciel. We've had a very active engagement by our chargé, and then we filled the position that the Congress created for a permanent special representative with Ambassador Derek Mitchell.

So for more than two years, ever since I asked that we do a review of our Burma policy in 2009, we have been reaching out, we've been trying to gather information, because we wanted to see change for the benefit of all of the people. And so we have been working toward this, and the reason that we were finally able to reach the decision that the president announced for me to visit is because of the steps that the government has taken.

We know more needs to be done, however, and we think that we have to wait to make sure that this commitment is real. So we're not only talking to senior members of the government, but we're talking to civil society members, we're talking to members of the political opposition, we're talking to representatives of ethnic minorities, because we want to be sure that we have as full a picture as possible.

So we're not at the point yet that we can consider lifting sanctions that we have in place because of our ongoing concerns about policies that have to be reversed. But any steps that the government takes will be carefully considered and will be, as I said, matched because we want to see political and economic reform take hold. And I told the leadership that we will certainly consider the easing and elimination of sanctions as we go forward in this process together. And it has to be not theoretical or rhetorical. It has to be very real, on the ground, that can be evaluated.

But we are open to that, and we are going to pursue many different avenues to demonstrate our continuing support for this path of reform.

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In response to questions from the press in Rangoon, Burma on December 2, 2011, Secretary Clinton elaborated on the United States position with regard to sanctions:

But I was very clear with the government that if we see enough progress, we would be prepared to begin to lift sanctions. But right now, we're not ready to discuss that because we obviously are only starting our engagement, and we want to see all political prisoners released, we want to see a serious effort at peace and reconciliation, we want to see dates set for the election, and then we will be very open to matching those actions with our own. And it was interesting, in our meetings with a lot of the people that I've talked with—and not just our meetings over the last two days but our meetings that many of our high officials have had over the last two years—there is a recognition that lifting sanctions would benefit the economy, but there needs to be some economic reforms along with the political reforms so that the benefits would actually flow to a broad-based group of people and not just to a very few.

Press availability in Rangoon, Burma, available at
www.state.gov/secretary/rm/2011/12/178103.htm.

7. Transnational Crime

On July 24, 2011, acting pursuant to the Constitution and U.S. laws including the International Emergency Economic Powers Act ("IEEPA"), the National Emergencies Act, and section 301 of title 3 of the U.S. Code, President Obama issued Executive Order 13581, "Blocking Property of Transnational Criminal Organizations." 76 Fed. Reg. 44,757 (July 27, 2011). President Obama acted based on his finding:

...that the activities of significant transnational criminal organizations, such as those listed in the Annex to this order, have reached such scope and gravity that they threaten the stability of international political and economic systems. Such organizations are becoming increasingly sophisticated and dangerous to the United States; they are increasingly entrenched in the operations of foreign governments and the international financial system, thereby weakening democratic institutions, degrading the rule of law, and undermining economic markets. These organizations facilitate and aggravate violent civil conflicts and increasingly facilitate the activities of other dangerous persons. I therefore determine that significant transnational criminal organizations constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

E.O. 13581 operates like other IEEPA executive orders, blocking property of those listed in its annex as well as persons designated subsequently. Section 1 of E.O. 13581 authorizes the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to determine which other persons constitute “a significant transnational criminal organization,” or have provided material support for, or are owned or controlled by, or acted for or on behalf of, other designees. The term “significant transnational criminal organization” is defined in Section 3(e):

(e) the term “significant transnational criminal organization” means a group of persons, such as those listed in the Annex to this order, that includes one or more foreign persons; that engages in an ongoing pattern of serious criminal activity involving the jurisdictions of at least two foreign states; and that threatens the national security, foreign policy, or economy of the United States.

The Annex lists four entities as significant transnational criminal organizations: the Brothers’ Circle; Camorra; the Yakuza; and Los Zetas. On August 11, 2011, OFAC provided additional identifying information for these four entities. 76 Fed. Reg. 51,125 (Aug. 17, 2011).

B. OTHER ISSUES

1. Litigation

a. Licensing requirement for Cuban company’s application to renew trademark

On March 29, 2011, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court’s decision granting summary judgment for OFAC in *Empresa Cubana Exportadora de Alimentos y Productos Varios d/b/a Cubaexport v. OFAC*, 638 F.3d. 794 (D.C. Cir. 2011). Cubaexport had registered its HAVANA CLUB trademark with the U.S. Patent and Trademark Office (“PTO”) in 1976, and an affiliate of Cubaexport renewed it in 1996 under a general license in the Cuban Assets Control Regulations authorizing transactions related to the registration and renewal of trademarks. 31 CFR § 515.527(a). In 1998, Congress modified that regulatory authorization to exclude registration and renewal of trademarks connected to confiscated properties. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 211(a)(1), 112 Stat. 2681, 2681–88 (1988) (“Section 211”). In seeking renewal of the trademark, Cubaexport did not initially rely on the general license provision, and instead sought a specific license from OFAC to authorize payment of the registration fee. OFAC declined to grant the specific license based on foreign-policy guidance provided by the State Department and other factors. PTO accordingly denied Cubaexport’s request to renew the trademark registration. Cubaexport filed suit against OFAC in federal district court, and the court granted summary judgment for OFAC. For earlier developments in the case, see *Digest 2009* at 648–49, *Digest 2007* at 828–30, and *Digest 2006* at 1006–15.

The majority opinion of the D.C. Circuit rejected both of Cubaexport’s main arguments invoking the presumption against retroactivity and the substantive due process

doctrine. The court found the presumption against retroactivity inapplicable because the Cuban Assets Control Regulations had long stated that the Secretary of the Treasury's authorization to register and renew trademarks notwithstanding the general prohibition on transactions involving Cuban-owned companies could be revoked at any time. As to substantive due process, the parties agreed that the 1998 Act did not involve a fundamental right. The court found that the 1998 Act was rationally related to the legitimate government goal of isolating Cuba's government and hastening a transition to democracy. The Court also disagreed with Cubaexport's contention that OFAC's actions were arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In particular, the court rejected Cubaexport's complaint that OFAC should not have relied on the State Department's guidance: "The State Department and OFAC are parts of a single Executive Branch headed by one President... [T]he State Department is an active participant in the Nation's foreign policy, and the Cuban embargo is of course a tool of foreign policy." 638 F.3d. at 803. Judge Silberman dissented, opining that the 1998 Act should apply only when a trademark is initially registered after 1998. *Id.* at 806. ***

b. Designation of Foreign Terrorist Organizations and related issues

See Chapter 3.B.1.c.(2).

2. Implementing Security Council Travel Bans

On July 24, 2011, President Barack Obama issued Proclamation 8693, "Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions." 76 Fed. Reg. 44,751 (July 27, 2011). The Proclamation suspends entry into the United States of all aliens subject to travel bans under U.N. Security Council resolutions (specific resolutions are listed in an annex) and all aliens whose property has been blocked pursuant to Executive Orders issued under the International Emergency Economic Powers Act ("IEEPA") (specific Executive Orders are listed in a separate annex).

3. OFAC Amendment to Method of Listing Blocked Persons

On June 30, 2011, OFAC published a final rule amending its regulations to remove the alphabetical lists (in appendices to those regulations) of all persons and vessels subject to blocking under its various economic sanctions programs, and replace those lists with references and instructions on where to find the most up-to-date information on those

*** Editor's note: On January 27, 2012, Cubaexport filed a petition for certiorari in the Supreme Court of the United States. The United States filed a brief opposing certiorari on April 2, 2012. On May 14, 2012, the Supreme Court issued an order denying certiorari.

persons and vessels. 76 Fed. Reg. 38,534 (June 30, 2011). The background section in the Federal Register notice explained the reason for the change:

The Department of the Treasury's Office of Foreign Assets Control ("OFAC") maintains a list of blocked persons, blocked vessels, specially designated nationals, specially designated terrorists, specially designated global terrorists, foreign terrorist organizations, and specially designated narcotics traffickers whose property and interests in property are blocked pursuant to the various economic sanctions programs administered by OFAC. OFAC previously has published that list as Appendix A to 31 CFR chapter V. OFAC is hereby amending Appendix A to replace this list with information on how to obtain up-to-date lists of such persons and vessels on OFAC's Web site or by other means, as well as with additional information pertaining to the lists. OFAC also is removing Appendix B to 31 CFR chapter V, which includes the names of certain blocked vessels, because more up-to-date information on such blocked vessels may be obtained on OFAC's Web site or by other means. Finally, OFAC is amending its regulations for a number of the sanctions programs it administers to revise references to Appendix A and remove references to Appendix B.

... Because new or updated information may be published in the Federal Register and added to OFAC's Web site at any time, the list of persons that previously appeared at Appendix A could be out-of-date at the time of its annual publication in the Federal Register. Frequently updated information on OFAC designations and other actions resulting in blocking is provided for examination on, or downloading from, OFAC's Web site (<http://www.treasury.gov/ofac>). Among other information, OFAC provides on its Web site the Specially Designated Nationals and Blocked Persons List ("SDN List"). OFAC updates the SDN List on an ongoing basis to reflect the inclusion or deletion of names as a result of new blocking, designation, identification, or delisting actions, as well as changes in identifying information, including alternative spellings and aliases. These updates also are published in notices in the Federal Register. Because the SDN List is updated on an ongoing basis to reflect additions and deletions of names, as well as changes in identifying information, it provides more up-to-date information than the list of persons previously published on an annual basis at Appendix A.

C. EXPORT CONTROLS

1. Commerce Department Entity List

During 2011 the Department of Commerce, Bureau of Industry and Security ("BIS"), amended the Export Administration Regulations ("EAR") to add 60 persons, located in Afghanistan, China, Cyprus, France, Greece, Hong Kong, Iran, Lebanon, Pakistan, Singapore, Syria, Ukraine, the United Arab Emirates, and the United Kingdom, to the Entity List. 76 Fed. Reg. 37,632 (June 28, 2011); 76 Fed. Reg. 44,259 (July 25, 2011); 76 Fed. Reg. 50,407 (Aug. 15, 2011); 76 Fed. Reg. 63,184 (Oct. 12, 2011); 76 Fed. Reg. 67,059 (Oct. 31, 2011); 76 Fed. Reg. 71,867 (Nov. 21, 2011). As BIS explained in the preambles to the final rules, "[t]he persons that are added to the Entity List have been determined by the U.S. Government to

be acting contrary to the national security or foreign policy interests of the United States.” Once a person is placed on the Entity List, BIS explained that “[a] BIS license is required for the export or reexport of any item subject to the EAR” to that person.

BIS also removed 6 persons, located in Hong Kong, New Zealand, Russia and the United Kingdom, from the Entity List. 76 Fed. Reg. 21,628 (Apr. 18, 2011); 76 Fed. Reg. 29,998 (May 24, 2011); 76 Fed. Reg. 63,184 (Oct. 21, 2011). Moreover, BIS amended 15 entries on the Entity List for persons in Canada, Iran, Russia, Syria, and the United Arab Emirates. 76 Fed. Reg. 21,628 (Apr. 18, 2011); 76 Fed. Reg. 29,998 (May 24, 2011); 76 Fed. Reg. 50,407 (Aug. 15, 2011); 76 Fed. Reg. 71,867 (Nov. 21, 2011).

In addition, effective January 25, 2011, BIS amended the EAR to implement several components of a bilateral understanding between India and the U.S. announced by President Obama and India’s Prime Minister Singh on November 8, 2010. The amendments included removing India’s defense and space-related entities (nine total) from the Entity List and removing India from three country groups in the EAR that are subject to end-use restrictions and adding it to one country group of members and adherents to the Missile Technology Control Regime (“MTCR”), as well as making conforming changes consistent with these steps. The notice of the final rule in the Federal Register explained that these changes “reflect India’s nonproliferation record and commitment to abide by multilateral export control standards.” 76 Fed. Reg. 4228 (Jan. 25, 2011).

2. Nonproliferation-related Changes

a. Australia Group

On April 20, 2011, the Department of Commerce, Bureau of Industry and Security (“BIS”) issued a final rule revising the EAR to implement changes the Australia Group adopted in 2010 to its “Control List of Dual-Use Chemical Manufacturing Facilities and Equipment and Related Technology and Software,” its “List of Biological Agents for Export Control,” and its “List of Animal Pathogens for Export Control.” 76 Fed. Reg. 22,017 (Apr. 12, 2011). On September 12, 2011, BIS issued a final rule revising the EAR to implement changes the Australia Group adopted in 2010 to its “List of Biological Agents for Export Control.” 76 Fed. Reg. 56,099 (Sep. 12, 2011).

b. Wassenaar Arrangement

On May 20, 2011, the Department of Commerce, Bureau of Industry and Security (“BIS”), issued a final rule amending the EAR to implement certain changes that governments participating in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies agreed in 2010 to make to the Wassenaar Arrangement’s List of Dual-Use Goods and Technologies (“Wassenaar List”). 76 Fed. Reg. 29,610 (May 20, 2011) (corrected at 76 Fed. Reg. 34,577 (June 14, 2011)). On June 24, 2011, BIS issued a final rule amending the EAR to implement certain changes to the Wassenaar List that were agreed on by participating governments in 2009. 76 Fed. Reg. 36,986 (June 24, 2011). For background on the Wassenaar Arrangement, see *II Cumulative Digest 1991–99* at 2265–66.

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Cross References

UN resolution condemning Iran-supported plot against Saudi ambassador, **Chapter 3.B.1.b.**

Designation of Foreign Terrorist Organizations, **Chapter 3.B.1.c.**

Trafficking in persons, **Chapter 3.B.3.**

Actions to counter piracy, Al-Shabaab, **Chapter 3.B.8.**

Human rights, **Chapter 6.**

Recognition of TNC in Libya, **Chapter 9.B.2.**

Requirement of OFAC license to garnish Cuban assets (Martinez v. Cuba), **Chapter 10.A.3.a.**

Sudan peace process, **Chapter 17.B.**

Nuclear nonproliferation issues in Iran, **Chapter 18.B.2.g.(2).**

Renewed mandate for 1540 Committee, **Chapter 18.B.3.**

Chapter 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

On February 18, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, provided the following explanation of the United States' opposition to a draft Security Council resolution on the situation in the Middle East, including the question of Palestine. Ambassador Rice's statement is available at <http://usun.state.gov/briefing/statements/2011/156816.htm>.

* * * *

The United States has been deeply committed to pursuing a comprehensive and lasting peace between Israel and the Palestinians. In that context, we have been focused on taking steps that advance the goal of two states living side by side in peace and security, rather than complicating it. That includes a commitment to work in good faith with all parties to underscore our opposition to continued settlements.

Our opposition to the resolution before this Council today should therefore not be misunderstood to mean we support settlement activity. On the contrary, we reject in the strongest terms the legitimacy of continued Israeli settlement activity. For more than four decades, Israeli settlement activity in territories occupied in 1967 has undermined Israel's security and corroded hopes for peace and stability in the region. Continued settlement activity violates Israel's international commitments, devastates trust between the parties, and threatens the prospects for peace.

The United States and our fellow Council members are also in full agreement about the urgent need to resolve the conflict between Israel and the Palestinians, based on the two-state solution and an agreement that establishes a viable, independent, and contiguous state of Palestine, once and for all. We have invested a tremendous amount of effort and resources in pursuit of this shared goal, and we will continue to do so.

But the only way to reach that common goal is through direct negotiations between the parties, with the active and sustained support of the United States and the international community.

It is the Israelis' and Palestinians' conflict, and even the best-intentioned outsiders cannot resolve it for them. Therefore every potential action must be measured against one overriding standard: will it move the parties closer to negotiations and an agreement? Unfortunately, this draft resolution risks hardening the positions of both sides. It could encourage the parties to stay out of negotiations and, if and when they did resume, to return to the Security Council whenever they reach an impasse.

Madame President, in recent years, no outside country has invested more than the United States of America in the effort to achieve Israeli-Palestinian peace.

In recent days, we offered a constructive alternative course forward that we believe would have allowed the Council to act unanimously to support the pursuit of peace. We regret that this effort was not successful and thus is no longer viable.

The great impetus for democracy and reform in the region makes it even more urgent to settle this bitter and tragic conflict in the context of a region moving towards greater peace and respect for human rights. But there simply are no shortcuts.

We hope that those who share our hopes for peace between a secure and sovereign Israel and Palestine will join us in redoubling our common efforts to encourage and support the resumption of direct negotiations.

While we agree with our fellow Council members—and indeed, with the wider world—about the folly and illegitimacy of continued Israeli settlement activity, we think it unwise for this Council to attempt to resolve the core issues that divide Israelis and Palestinians. We therefore regrettably have opposed this draft resolution.

* * * *

On May 19, 2011, President Barack Obama delivered remarks at the State Department concerning the changes taking place in the Middle East and North Africa in 2011. Daily Comp. Pres. Docs., 2011 DCPD No. 00368, pp. 1–10. He concluded his remarks by discussing the pursuit of peace between Israelis and Palestinians. That discussion appears below.

* * * *

For decades, the conflict between Israelis and Arabs has cast a shadow over the region. For Israelis, it has meant living with the fear that their children could be blown up on a bus or by rockets fired at their homes, as well as the pain of knowing that other children in the region are taught to hate them. For Palestinians, it has meant suffering the humiliation of occupation and never living in a nation of their own. Moreover, this conflict has come with a larger cost to the Middle East, as it impedes partnerships that could bring greater security and prosperity and empowerment to ordinary people.

For over 2 years, my administration has worked with the parties and the international community to end this conflict, building on decades of work by previous administrations. Yet expectations have gone unmet. Israeli settlement activity continues. Palestinians have walked away from talks. The world looks at a conflict that has grinded on and on and on and sees nothing but stalemate. Indeed, there are those who argue that with all the change and uncertainty in the region, it is simply not possible to move forward now.

I disagree. At a time when the people of the Middle East and North Africa are casting off the burdens of the past, the drive for a lasting peace that ends the conflict and resolves all claims is more urgent than ever. That's certainly true for the two parties involved.

For the Palestinians, efforts to delegitimize Israel will end in failure. Symbolic actions to isolate Israel at the United Nations in September won't create an independent state. Palestinian leaders will not achieve peace or prosperity if Hamas insists on a path of terror and rejection. And Palestinians will never realize their independence by denying the right of Israel to exist.

As for Israel, our friendship is rooted deeply in a shared history and shared values. Our

commitment to Israel's security is unshakeable. And we will stand against attempts to single it out for criticism in international forums. But precisely because of our friendship, it's important that we tell the truth: The status quo is unsustainable, and Israel too must act boldly to advance a lasting peace.

The fact is, a growing number of Palestinians live west of the Jordan River. Technology will make it harder for Israel to defend itself. A region undergoing profound change will lead to populism in which millions of people—not just one or two leaders—must believe peace is possible. The international community is tired of an endless process that never produces an outcome. The dream of a Jewish and democratic state cannot be fulfilled with permanent occupation.

Now ultimately, it is up to the Israelis and Palestinians to take action. No peace can be imposed upon them, not by the United States, not by anybody else. But endless delay won't make the problem go away. What America and the international community can do is to state frankly what everyone knows: a lasting peace will involve two states for two peoples—Israel as a Jewish state and the homeland for the Jewish people and the state of Palestine as the homeland for the Palestinian people—each state enjoying self-determination, mutual recognition, and peace.

So while the core issues of the conflict must be negotiated, the basis of those negotiations is clear: a viable Palestine, a secure Israel. The United States believes that negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt, and permanent Israeli borders with Palestine. We believe the borders of Israel and Palestine should be based on the 1967 lines with mutually agreed swaps, so that secure and recognized borders are established for both states. The Palestinian people must have the right to govern themselves, and reach their full potential, in a sovereign and contiguous state.

As for security, every state has the right to self-defense, and Israel must be able to defend itself, by itself, against any threat. Provisions must also be robust enough to prevent a resurgence of terrorism, to stop the infiltration of weapons, and to provide effective border security. The full and phased withdrawal of Israeli military forces should be coordinated with the assumption of Palestinian security responsibility in a sovereign, nonmilitarized state. And the duration of this transition period must be agreed, and the effectiveness of security arrangements must be demonstrated.

These principles provide a foundation for negotiations. Palestinians should know the territorial outlines of their state; Israelis should know that their basic security concerns will be met. I'm aware that these steps alone will not resolve the conflict, because two wrenching and emotional issues will remain: the future of Jerusalem and the fate of Palestinian refugees. But moving forward now on the basis of territory and security provides a foundation to resolve those two issues in a way that is just and fair and that respects the rights and aspirations of both Israelis and Palestinians.

Now, let me say this: Recognizing that negotiations need to begin with the issues of territory and security does not mean that it will be easy to come back to the table. In particular, the recent announcement of an agreement between Fatah and Hamas raises profound and legitimate questions for Israel: How can one negotiate with a party that has shown itself unwilling to recognize your right to exist? And in the weeks and months to come, Palestinian leaders will have to provide a credible answer to that question. Meanwhile, the United States, our Quartet partners, and the Arab States will need to continue every effort to get beyond the current impasse.

* * * *

On May 20, 2011, the day after President Obama delivered the remarks excerpted above, the Middle East Quartet (representatives of the United Nations, the European Union, the Russian Federation, and the United States) issued a statement in support of President Obama's proposal for resuming negotiations on peace in the Middle East. The Quartet's statement appears below, and is available at www.state.gov/r/pa/prs/ps/2011/05/163941.htm.

The Members of the Quartet are in full agreement about the urgent need to resolve the conflict between Israel and the Palestinians. To that effect, the Quartet expressed its strong support for the vision of Israeli-Palestinian peace outlined by U.S. President Barack Obama on May 19, 2011. The Quartet agrees that moving forward on the basis of territory and security provides a foundation for Israelis and Palestinians to reach a final resolution of the conflict through serious and substantive negotiations and mutual agreement on all core issues.

The Quartet reiterates its strong appeal to the parties to overcome the current obstacles and resume direct bilateral negotiations without delay or preconditions. The Quartet further recommit itself to its previous statements and principles.

On May 22, President Obama addressed the American Israel Public Affairs Committee ("AIPAC") Policy Conference. Daily Comp. Pres. Docs., 2011 DCPD No. 00377, pp. 1-6. He reiterated many of the points he made about the peace process in his May 19 remarks. Excerpts from President Obama's May 22 address appear below.

* * * *

Now, I have said repeatedly that core issues can only be negotiated in direct talks between the parties. And I indicated on Thursday that the recent agreement between Fatah and Hamas poses an enormous obstacle to peace. No country can be expected to negotiate with a terrorist organization sworn to its destruction. And we will continue to demand that Hamas accept the basic responsibilities of peace, including recognizing Israel's right to exist and rejecting violence and adhering to all existing agreements. ...

And yet no matter how hard it may be to start meaningful negotiations under current circumstances, we must acknowledge that a failure to try is not an option. The status quo is unsustainable. And that is why on Thursday, I stated publicly the principles that the United States believes can provide a foundation for negotiations toward an agreement to end the conflict and all claims, the broad outlines of which have been known for many years and have been the template for discussions between the United States, Israel, and the Palestinians since at least the Clinton administration.

* * * *

... I firmly believe, and I repeated on Thursday, that peace cannot be imposed on the parties to the conflict. No vote at the United Nations will ever create an independent Palestinian state. And the United States will stand up against efforts to single Israel out at the United Nations or in any international forum. Israel's legitimacy is not a matter for debate. That is my commitment; that is my pledge to all of you.

Moreover, we know that peace demands a partner, which is why I said that Israel cannot be expected to negotiate with Palestinians who do not recognize its right to exist. And we will hold the Palestinians accountable for their actions and for their rhetoric.

But the march to isolate Israel internationally and the impulse of the Palestinians to abandon negotiations will continue to gain momentum in the absence of a credible peace process and alternative. And for us to have leverage with the Palestinians, to have leverage with the Arab States, and with the international community, the basis for negotiations has to hold out the prospect of success. And so in advance of a 5-day trip to Europe in which the Middle East will be a topic of acute interest, I chose to speak about what peace will require.

There was nothing particularly original in my proposal. This basic framework for negotiations has long been the basis for discussions among the parties, including previous U.S. administrations. Since questions have been raised, let me repeat what I actually said on Thursday, not what I was reported to have said.

I said that the United States believes that negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt and permanent Israeli borders with Palestine. The borders of Israel and Palestine should be based on the 1967 lines with mutually agreed swaps so that secure and recognized borders are established for both states. The Palestinian people must have the right to govern themselves and reach their potential in a sovereign and contiguous state.

As for security, every state has the right to self-defense, and Israel must be able to defend itself, by itself, against any threat. Provisions must also be robust enough to prevent a resurgence of terrorism, to stop the infiltration of weapons, and to provide effective border security. And a full and phased withdrawal of Israeli military forces should be coordinated with the assumption of Palestinian security responsibility in a sovereign and nonmilitarized state. And the duration of this transition period must be agreed, and the effectiveness of security arrangements must be demonstrated.

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...[L]et me reaffirm what "1967 lines with mutually agreed swaps" means.

By definition, it means that the parties themselves—Israelis and Palestinians—will negotiate a border that is different than the one that existed on June 4, 1967. That's what mutually agreed-upon swaps means. It is a well-known formula to all who have worked on this issue for a generation. It allows the parties themselves to account for the changes that have taken place over the last 44 years. It allows the parties themselves to take account of those changes, including the new demographic realities on the ground, and the needs of both sides. The ultimate goal is two states for two people: Israel as a Jewish state and the homeland for the Jewish people and the state of Palestine as the homeland for the Palestinian people, each state enjoying self-determination, mutual recognition, and peace.

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On September 21, 2011, President Obama addressed the United Nations General Assembly on the subject of pursuing peace and discussed the Israeli-Palestinian conflict, among other topics. Daily Comp. Pres. Docs. 2011 DCPD No. 00661, pp. 4-5. President Obama's discussion of the peace process from that September 21 speech follows.

* * * *

Now, I know, particularly this week, that for many in this hall, there's one issue that stands as a test for these principles and a test for American foreign policy, and that is the conflict between the Israelis and the Palestinians.

One year ago, I stood at this podium, and I called for an independent Palestine. I believed then and I believe now that the Palestinian people deserve a state of their own. But what I also said is that a genuine peace can only be realized between the Israelis and the Palestinians themselves. One year later, despite extensive efforts by America and others, the parties have not bridged their differences. Faced with this stalemate, I put forward a new basis for negotiations in May of this year. That basis is clear. It's well known to all of us here. Israelis must know that any agreement provides assurances for their security. Palestinians deserve to know the territorial basis of their state.

Now, I know that many are frustrated by the lack of progress. I assure you, so am I. But the question isn't the goal that we seek, the question is how do we reach that goal. And I am convinced that there is no shortcut to the end of a conflict that has endured for decades. Peace is hard work. Peace will not come through statements and resolutions at the United Nations. If it were that easy, it would have been accomplished by now. Ultimately, it is the Israelis and the Palestinians who must live side by side. Ultimately, it is the Israelis and the Palestinians, not us, who must reach agreement on the issues that divide them: on borders and on security, on refugees and Jerusalem.

Ultimately, peace depends upon compromise among people who must live together long after our speeches are over, long after our votes have been tallied. That's the lesson of Northern Ireland, where ancient antagonists bridged their differences. That's the lesson of Sudan, where a negotiated settlement led to an independent state. And that is and will be the path to a Palestinian state: negotiations between the parties.

We seek a future where Palestinians live in a sovereign state of their own, with no limit to what they can achieve. There's no question that the Palestinians have seen that vision delayed for too long. It is precisely because we believe so strongly in the aspirations of the Palestinian people that America has invested so much time and so much effort in the building of a Palestinian state and the negotiations that can deliver a Palestinian state.

But understand this as well: America's commitment to Israel's security is unshakeable. Our friendship with Israel is deep and enduring. And so we believe that any lasting peace must acknowledge the very real security concerns that Israel faces every single day.

Let us be honest with ourselves: Israel is surrounded by neighbors that have waged repeated wars against it. Israel's citizens have been killed by rockets fired at their houses and suicide bombs on their buses. Israel's children come of age knowing that throughout the region, other children are taught to hate them. Israel, a small country of less than 8 million people, look

out at a world where leaders of much larger nations threaten to wipe it off of the map. The Jewish people carry the burden of centuries of exile and persecution and fresh memories of knowing that 6 million people were killed simply because of who they are. Those are facts. They cannot be denied.

The Jewish people have forged a successful state in their historic homeland. Israel deserves recognition. It deserves normal relations with its neighbors. And friends of the Palestinians do them no favors by ignoring this truth, just as friends of Israel must recognize the need to pursue a two-state solution with a secure Israel next to an independent Palestine.

That is the truth. Each side has legitimate aspirations, and that's part of what makes peace so hard. And the deadlock will only be broken when each side learns to stand in the other's shoes, each side can see the world through the other's eyes. That's what we should be encouraging. That's what we should be promoting.

This body—founded, as it was, out of the ashes of war and genocide, dedicated, as it is, to the dignity of every single person—must recognize the reality that is lived by both the Palestinians and the Israelis. The measure of our actions must always be whether they advance the right of Israeli and Palestinian children to live lives of peace and security and dignity and opportunity. And we will only succeed in that effort if we can encourage the parties to sit down, to listen to each other, and to understand each other's hopes and each other's fears. That is the project to which America is committed. There are no shortcuts. And that is what the United Nations should be focused on in the weeks and months to come.

* * * *

Representatives of the Quartet met in New York on September 23, 2011, and issued another statement, affirming their support for the resumption of peace talks. The Quartet's September statement follows and is also available at www.state.gov/r/pa/prs/ps/2011/09/173919.htm.

* * * *

The Quartet takes note of the application submitted by President Abbas on 23rd September 2011 which is now before the Security Council.*

The Quartet reaffirmed its statement of 20th May 2011, including its strong support for the vision of Israeli-Palestinian peace outlined by United States President Barack Obama.

The Quartet recalled its previous statements, and affirmed its determination to actively and vigorously seek a comprehensive resolution of the Arab-Israeli conflict, on the basis of UN Security Council Resolutions 242, 338, 1397, 1515, 1850, the Madrid principles including land for peace, the Roadmap, and the agreements previously reached between the parties.

The Quartet reiterated its commitment to a just, lasting and comprehensive peace in the Middle East and to seek a comprehensive resolution of the Arab-Israeli conflict, and reaffirms the importance of the Arab Peace Initiative.

The Quartet reiterated its urgent appeal to the parties to overcome the current obstacles and resume direct bilateral Israeli-Palestinian negotiations without delay or preconditions. But it

* Editor's note: See discussion in Chapter 7.B.

accepts that meeting, in itself, will not reestablish the trust necessary for such a negotiation to succeed. It therefore proposes the following steps:

1. Within a month there will be a preparatory meeting between the parties to agree an agenda and method of proceeding in the negotiation.

2. At that meeting there will be a commitment by both sides that the objective of any negotiation is to reach an agreement within a timeframe agreed to by the parties but not longer than the end of 2012. The Quartet expects the parties to come forward with comprehensive proposals within three months on territory and security, and to have made substantial progress within six months. To that end, the Quartet will convene an international conference in Moscow, in consultation with the parties, at the appropriate time.

3. There will be a Donors Conference at which the international community will give full and sustained support to the Palestinian Authority state-building actions developed by Prime Minister Fayyad under the leadership of President Abbas.

4. The Quartet recognizes the achievements of the Palestinian Authority in preparing institutions for statehood as evidenced in reports to the Ad Hoc Liaison Committee, and stresses the need to preserve and build on them. In this regard, the members of the Quartet will consult to identify additional steps they can actively support towards Palestinian statehood individually and together, to secure in accordance with existing procedures significantly greater independence and sovereignty for the Palestinian Authority over its affairs.

5. The Quartet calls upon the parties to refrain from provocative actions if negotiations are to be effective. The Quartet reiterated the obligations of both parties under the Roadmap.

6. The Quartet committed to remain actively involved and to encourage and review progress. The Quartet agreed to meet regularly and to task the envoys and the Quartet Representative to intensify their cooperation, including by meeting prior to the parties' preparatory meeting, and to formulate recommendations for Quartet action.

* * * *

On October 24, 2011, at a Security Council debate on the Middle East, Ambassador Rice delivered remarks that included a part, reprinted below, on the United States' ongoing efforts to promote peace in the Middle East and its position on recent actions of the Israelis and Palestinians. The full text of Ambassador Rice's remarks is available at www.state.gov/p/io/rm/2011/176080.htm.

* * * *

The United States continues to work vigorously with the parties, the Quartet, and our international partners to resume negotiations on the basis of the September 23rd Quartet statement. That statement provides a clear and credible path back to the negotiating table, which is the only path to achieve the two-state solution we all seek. The Quartet statement reaffirms President Obama's vision for peace as laid out in his May remarks. President Abbas and Prime Minister Netanyahu have each agreed to send negotiators to Jerusalem for preparatory meetings with the Quartet envoys on October 26th. Thus, our focus remains on laying the groundwork for these and subsequent meetings leading to the two parties exchanging comprehensive proposals

on territory and security by the end of the year, as outlined in the Quartet's timeline. We urge all members of this Council and all member states to unite to help create a positive climate for resuming negotiations.

Ultimately, it is the Israelis and the Palestinians who must live side by side. Only they can reach agreement on the painful issues that divide them: borders and security, refugees, and Jerusalem. We have been very clear that we believe Palestinian efforts to seek member-state status at the United Nations will not advance the peace process but rather will complicate, delay, and perhaps derail prospects for a negotiated settlement. Therefore, we have consistently opposed such unilateral initiatives. We will continue at the same time to exert every effort to bring the parties back to the negotiating table.

Like every American administration for decades, the Obama administration does not accept the legitimacy of continued Israeli settlement activity. The fate of existing settlements is one that must be dealt with by the parties, along with the other permanent-status issues, including the status of Jerusalem. For that reason, steps by the Government of Israel to advance significant new construction in Givat Hamatos are deeply disappointing.

The illegal trafficking of weapons in Gaza continues to pose a serious threat to civilians in Gaza, in Israel, and in Egypt. It must be stopped. With regard to Hamas, we reaffirm the importance of fulfilling the Quartet principles' commitment to nonviolence, recognition of Israel's right to exist, and recognition of previous agreements. We call again on Palestinians and Israelis to take constructive actions to promote peace and to avoid actions that complicate this process or undermine trust.

* * * *

In the keynote address at the National Democratic Institute's Awards Dinner on November 7, 2011, Secretary of State Hillary Rodham Clinton reviewed developments in the Middle East and North Africa in 2011. Her remarks, available at www.state.gov/secretary/rm/2011/11/176750.htm, included the following comments on the need for a negotiated peace between the Palestinians and Israelis:

And there is one last question that I'm asked, in one form or another, all the time: What about the rights and aspirations of the Palestinians? Israelis and Palestinians are not immune to the profound changes sweeping the region. And make no mistake, President Obama and I believe that the Palestinian people—just like their Arab neighbors, just like Israelis, just like us—deserve dignity, liberty, and the right to decide their own future. They deserve an independent, democratic Palestinian state of their own, alongside a secure Jewish democracy next door. And we know from decades in the diplomatic trenches that the only way to get there is through a negotiated peace—a peace we work every day to achieve, despite all the setbacks.

B. PEACEKEEPING AND RELATED ISSUES

1. Sudan

During 2011, the United States continued its bilateral and multilateral initiatives to support full implementation of the Comprehensive Peace Agreement of 2005 (“CPA”) and to end the conflict in Darfur.

In January, the people of South Sudan participated in an orderly and successful referendum on independence. In February, the Government of South Sudan announced the results of the referendum. The results were acknowledged and accepted by the United States and other nations. Secretary Clinton stated:

The United States congratulates the Government of Sudan on the announcement of the Southern Sudan referendum results. We congratulate northern and southern leaders for facilitating a peaceful and orderly vote, and now that the people of Southern Sudan have made this compelling statement, we commend the Government of Sudan for accepting its outcome.

Press Statement, Feb. 7, 2011, available at www.state.gov/secretary/rm/2011/02/156107.htm.

The United States also joined the other witnesses to the CPA (African Union, Republic of Egypt, European Union, Inter-Governmental Authority on Development, Republic of Kenya, Government of Italy, League of Arab States, Royal Kingdom of the Netherlands, Royal Norwegian Government, Republic of Uganda, United Kingdom and Northern Ireland, United Nations) in the following joint statement on the referendum’s outcome (the statement is available at www.state.gov/r/pa/prs/ps/2011/02/156183.htm).

* * * *

We, the countries and organizations that witnessed the signing of the Comprehensive Peace Agreement in 2005, welcome the conclusion of the Southern Sudan referendum and the announcement of the final result by the Southern Sudan Referendum Commission on February 7, 2011. We congratulate the parties to the CPA and the Southern Sudan Referendum Commission on a successful referendum process, and we welcome the acceptance of the result by the Government of Sudan. We have noted the positive statements by international and domestic observers which confirm that the referendum was credible, peaceful, and met international standards. We have also taken note of the statement by the UN Secretary General’s High Level Monitoring Panel on January 16 that the process allowed the people of Southern Sudan to express their will freely. In view of these assessments, we confirm our acceptance of the result of the referendum in favor of the secession of Southern Sudan.

We commend both CPA parties for the leadership they have demonstrated. We call on them to redouble their efforts to reach agreement on the outstanding CPA and post-referendum issues, with the facilitation of the AU High-Level Implementation Panel. The status of Abyei must be resolved in a way that respects the rights and interests of affected populations. Popular consultations in Blue Nile and Southern Kordofan states should also be conducted in a timely and inclusive manner. The demarcation of the common border and the status of disputed areas should be settled. Finally, we urge the parties to continue to work together in the remaining months of the CPA to put in place arrangements on security, citizenship, international treaties,

economics, a soft border and natural resources which provide the basis for two stable, secure, and economically prosperous states living in peace with one another and their neighbors.

We emphasize our commitment to the establishment of long term peace, security and prosperity for all of the peoples of Sudan. As witnesses to the CPA, we recognize the critical importance of continued close cooperation between Northern and Southern Sudan and we underline our willingness to continue to provide international support to this end.

* * * *

On March 9, 2011, the White House issued a statement condemning violence in the Abyei region of Sudan and urging the parties to resolve issues relating to Abyei. The White House Statement, reprinted below, is available at www.whitehouse.gov/the-press-office/2011/03/09/statement-press-secretary-recent-violence-abyei-region-sudan.

* * * *

The United States deplores the recent violence in the Abyei region of Sudan and calls on Northern and Southern Sudanese leaders to take immediate steps to prevent future attacks and restore calm. This dangerous standoff is unacceptable for the Sudanese people, and we condemn the deployment of forces by both sides. Their presence in Abyei stands in violation of the 2005 Comprehensive Peace Agreement and runs counter to efforts to reach agreement on the region's final status.

This past September, President Obama spoke of the two paths before the Government of Sudan: a path of peace, a path of fulfilled commitments, and greater engagement; and a path of continued conflict, continued obstruction, and greater, more painful isolation. The successful referendum was but one step toward fulfilling the Government of Sudan's obligations under the Comprehensive Peace Agreement. The Government of South Sudan too must recommit itself to resolving the remaining contentious issues in dispute.

The United States welcomes the commitment made by the National Congress Party and Sudan People's Liberation Movement to establish a committee based in Abyei to review security arrangements relating to the annual migration. We urge this committee to immediately establish a presence in Abyei and to complete its security assessment and recommendations as quickly as possible. Both North and South must also provide the UN Mission in Sudan the full and unfettered access required to fulfill its mandate, which includes assessing the security and humanitarian situation where fighting has taken place and protecting civilians.

We call on Presidents Bashir and Kiir to meet as soon as possible and demonstrate that they are serious about making urgent progress in talks to resolve Abyei's final status in a manner that addresses the needs of all communities and upholds the Abyei Protocol and the ruling of the Permanent Court of Arbitration.

* * * *

On May 10, 2011, the Sudan Troika (the United States, United Kingdom, and Norway) issued a joint statement on recent developments in Sudan following a visit by

Troika representatives to the region earlier in May. The statement appears below and is available at www.state.gov/r/pa/prs/ps/2011/05/162942.htm.

* * * *

As we enter the final two months of the Comprehensive Peace Agreement's Interim Period, we call on the CPA parties to intensify their negotiations to finalize arrangements that will provide the basis for two stable, secure, and viable states living in peace with one another and their neighbors. We applaud the progress the parties have made thus far with the facilitation of the Africa Union High-Level Implementation Panel, but note that much work remains to be done. We call on the parties to approach the next two months with a renewed sense of urgency to resolve key outstanding issues, especially the future status of Abyei, before the end of the CPA.

We are especially concerned about the alarming situation in Abyei. Recent actions by both CPA parties run counter to President Bashir and President Kiir's agreement to resolve the situation peacefully through negotiation and the assistance of the African Union High Level Implementation Panel. The introduction by both sides of armed forces into Abyei has caused violence, including the death of 11 Northern JIU members, and more suffering for the local population. The parties should desist from these actions which represent a clear violation of the CPA. Moreover, at this critical stage we call on the leaders of the North and the South to refrain from inflammatory language and other acts that provoke the other side. We welcome agreement reached May 5 to immediately implement the Kadugli Agreements and withdraw illegal troops from Abyei. We also welcome the May 8 and 9 joint technical committee meetings held in Kadugli and Abyei, and urge the parties to ensure that the committee expeditiously fulfills its mandate to remove all illegal troops from Abyei. We urge both sides to avoid further escalation that could endanger the peaceful atmosphere of the CPA and ultimately make resolution of the Abyei issue more difficult. We reaffirm our commitment to support a peaceful negotiated final solution to the status of Abyei that builds on the CPA and is consistent with the decision of the Permanent Court of Arbitration.

We welcome the peaceful completion of polling for Southern Kordofan's elections, but are concerned about rising tensions in the state due to a delay in the announcement of preliminary results. We call on local and national leaders to take immediate steps to improve the security situation and exercise control over all armed security elements. We also call on the parties to work together to maintain calm as the preliminary results are announced and to refrain from prematurely declaring electoral victories. The parties should work together to resolve any election disputes peacefully through the courts. In order to maintain stability and promote long-term cooperation, they should build an inclusive government no matter the outcome. It is critical that the elections pave the way for the start of Southern Kordofan's popular consultations, which remain an important outstanding element of the CPA.

We have been encouraged by the recent renewal of face-to-face negotiations between the Government of Sudan (GOS) and Justice and Equality Movement (JEM) in Doha. However, these talks have once again broken down due to inflexibility on each side. We urge GOS and

JEM to re-launch these negotiations as soon as possible. The GOS, JEM, and Liberation and Justice Movement (LJM) must all seize upon this moment to bring lasting peace to Darfur by working to achieve an inclusive political agreement and a ceasefire. To do so, they must deal with the core pending issues in an expedited manner. We believe all Darfuri armed movements that remain outside of the Doha process should come to Doha, and welcome the invitations sent by the AU/UN Joint Mediation and Government of Qatar to several groups, notably the Sudan Liberation Army factions of Abdel Wahid Al Nur and Minni Minawi. We strongly encourage these leaders to associate themselves and their movements with these talks.

* * * *

On June 20, 2011 the parties to the CPA in Sudan signed an agreement regarding Abyei after negotiations assisted by the African Union High-level Implementation Panel. Ambassador Rice welcomed the agreement and urged implementation of all the parties' obligations in a statement at the Security Council on June 20, 2011, excerpted below. The full text of Ambassador Rice's statement is available at <http://usun.state.gov/briefing/statements/2011/166533.htm>.

* * * *

...[W]e welcome the news that the parties have just signed an agreement on temporary administrative and security arrangements for Abyei and the withdrawal of Sudanese Armed Forces. ...

This Council will closely monitor adherence with its statements and the progress towards rapidly ensuring that the terms of the Addis Agreement are swiftly fulfilled.

We want to underscore the urgency of Ethiopian troops deploying immediately to Abyei as the agreed interim security force, under UN auspices and on the timeline agreed to by the parties....

The United States will soon circulate a draft Security Council Resolution for Council consideration to authorize creation of this proposed Interim Security Force for Abyei.

Unfortunately, the situation in Abyei is by no means the only crisis facing the people of Sudan. ...

On June 5, violence broke out in multiple areas of Southern Kordofan, including its capital, Kadugli. The reports my government has been receiving of the ongoing fighting are horrifying—both because of the scope of human rights abuses and because of the ethnic dimensions to the conflict. The Sudanese Armed Forces have shelled and bombed the areas around Kadugli. Ongoing and intense aerial bombardments threaten the lives of civilians and UN personnel; a bomb fell just 100 meters from the UNMIS compound in Kauda. The Sudanese Armed Forces have threatened to shoot down UNMIS air patrols.

They have taken control of the airport in Kadugli and refuse landing rights to UNMIS flights, which has continued for so long that UN staff located in the compound and UN teamsites are running dangerously low on food and supplies. UNMIS's lack of access is alarming and indefensible. UNMIS and humanitarian aid workers must be granted full access, most especially when so many are in need of food, water, and humanitarian aid.

According to the United Nations, more than 360,000 people have been displaced in Sudan over the past 6 months, and more than half were displaced in the past month. As many as 75,000 people have fled the fighting in Southern Kordofan.

International NGOs operating there are evacuating their staff, and a humanitarian crisis of enormous proportions is unfolding. Up to 10,000 people have sought refuge at the UNMIS compound in Kadugli. The United States calls on both parties to facilitate access for UNMIS and humanitarian aid workers.

We are also concerned that the Sudanese People's Liberation Army has deployed north of the 01/01/56 border into Southern Kordofan in violation of the Comprehensive Peace Agreement.

...[W]e have also received reports that forces aligned with the Government of Sudan searched for Southern forces and sympathizers, whom they arrested and allegedly executed. We have received further allegations, not yet corroborated, but so alarming that I must mention them, that the Sudanese Armed Forces are arming elements of the local population and placing mines in areas of Kadugli. The United States condemns all acts of violence, especially those that target individuals based on their ethnicity or political affiliation. Security services and military forces have reportedly detained and summarily executed local authorities, political rivals, medical personnel, and others. These acts could constitute war crimes or crimes against humanity.

We demand that the perpetrators immediately halt these actions and be held accountable for their crimes. We call on the UN to fully investigate these incidents, and request a report from the Secretary General to the Council by the end of June that details any human rights abuses that were committed during recent hostilities in Abyei and Southern Kordofan. We are deeply concerned by reports that members of the Sudan People's Liberation Army have threatened the safety of persons of Arab origin in Southern Kordofan, including UN staff, and we insist that the Sudan People's Liberation Army leadership condemn these actions and refrain from any reprisals.

[T]he Government of Sudan can prevent this crisis from escalating further by immediately stopping its military efforts to disarm the Sudan People's Liberation Army in Southern Kordofan and by focusing on diplomatic efforts to peacefully resolve the conflict. The Sudanese government should also cease trying to dissolve the Joint/Integrated Units in Southern Kordofan, which were established under the CPA. Security arrangements for Southern Kordofan and Blue Nile States should be agreed upon through direct, high-level negotiations—and not dictated by the use of force.

We call for the Government of Sudan and the Sudan People's Liberation Movement-North to agree immediately on a cessation of hostilities and to immediately end restrictions on humanitarian access and UN movements.

It's essential that violence against civilians and humanitarian abuses stop and stop now. The United States calls upon both parties to end the conflict and resolve the underlying issues in Southern Kordofan and Blue Nile as they are now beginning to do in Abyei.

Finally, we want to underscore the imperative of timely and candid assessments for the Council about the evolving situation, for which we crucially depend on the Secretariat. This is essential for us to be able to determine and take actions necessary to ensure that the UN can carry out its mission. Contingents unwilling to carry out their mandate to protect civilians should not be part of this crucial mission. Contingents under attack also need our backup and support. With the failure of their government to live up to its responsibilities, the Sudanese people have turned to the international community for protection, and we have an obligation to provide it.

* * * *

Shortly after the parties reached their June 20 agreement, the Security Council adopted Resolution 1990 on June 27, 2011, authorizing the deployment of peacekeepers to the Abyei region of Sudan as the UN Interim Security Force for Abyei ("UNISFA"). U.N. Doc. S/RES/1990. In a press statement issued that day, Secretary Clinton welcomed the resolution. Secretary Clinton's statement appears below and is also available at www.state.gov/secretary/rm/2011/06/167157.htm.

* * * *

The United States commends the swift passage of UN Security Council resolution 1990, which approves the mandate requested by Sudanese leaders to facilitate the deployment of up to 4200 Ethiopian peacekeepers to the Abyei region of Sudan.

Abyei has been a source of regional tension for many years, as the world witnessed last month when Sudanese Armed Forces forcibly took control of the region, resulting in widespread displacement and looting.

The approval of this force is a critical step in implementing the June 20 agreement signed by the parties, whereby the Sudanese Armed Forces will withdraw from the Abyei area along with any Sudan People's Liberation Army forces there. An Ethiopian brigade will deploy as the United Nations Interim Security Force to enforce this withdrawal and maintain security throughout the Abyei region.

We urge the Sudanese Government and the Sudan People's Liberation Movement to make good on their commitments to withdraw forces from Abyei and use the talks facilitated by the African Union High-Level Implementation Panel to reach mutual agreement on the future status of Abyei.

While the United States welcomes this Security Council resolution regarding Abyei, we remain deeply concerned about the on-going crisis in Southern Kordofan. Tens of thousands of people have been driven from their homes, and there are reports of very serious human rights abuses and violence targeting individuals based on their ethnicity and political affiliation. Also of concern is the troubling detention of Sudanese local staff members of the UN Mission in Sudan by Sudanese authorities last week as they were being evacuated from the airport in Kadugli. While two staff members have been released, five remain in the custody of Sudanese military officials. We call on the Sudanese Government to release them immediately and cease any harassment and intimidation of UN personnel in Southern Kordofan. We urge the parties to reach an immediate ceasefire and to provide aid workers with the unfettered access required to deliver humanitarian assistance to innocent civilians affected by the conflict.

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On July 11, 2011, the Security Council adopted Resolution 1997, withdrawing UNMIS forces from Sudan. U.N. Doc. S/RES/1997. Ambassador Rice explained the United States' reluctance to accede to the Government of Sudan's request to cease UNMIS activities and

urged the parties to continue to negotiate for peace in Sudan. Her remarks, provided as an explanation of the U.S. vote on Resolution 1977, are set forth below and available at <http://usun.state.gov/briefing/statements/2011/168014.htm>.

* * * *

The United States deeply regrets the necessity to vote on this resolution to end the UNMIS mandate. We call on the Government of Sudan yet again to reconsider its demand that UNMIS cease its activities in the Republic of Sudan effective July 9. The mission has a critical role to continue to play in regional stability, especially in the Two Areas.

The United States is sending a clear message along with other Council members that it wants the United Nations to remain in the Two Areas, especially at this critical juncture. With this resolution, the Council has made clear that it is ready to authorize continued UN operations in Southern Kordofan and Blue Nile to support new security arrangements, and we will continue over the coming weeks to urge the Government of Sudan to accept this. It is in their interest to do so. We hope others in the international community will continue to encourage Khartoum to accept this.

It is critical that the Government of Sudan cooperate fully with UNMIS as it begins the process of withdrawing.

We continue to be deeply concerned about the fighting in Southern Kordofan, the displacement of civilians, and the ensuing humanitarian crisis. The Government of Sudan and SPLM-North must return to the negotiating table in the coming days and agree to an immediate cessation of hostilities. We call on the Government of Sudan as well to work actively on agreements to bring peace and stability to the border, and in Blue Nile and Southern Kordofan states. ...

* * * *

On December 6, 2011, the Sudan Troika issued another joint statement, commending the parties on recent successful negotiations on petroleum sector and financial issues and urging them to reach agreement on other post-CPA issues. The joint statement appears below and is available at www.state.gov/r/pa/prs/ps/2011/12/178314.htm.

* * * *

We welcome the discussions held on transitional financial arrangements and commercial oil fees between the Government of Sudan (GoS) and Government of South Sudan (GoSS) that were facilitated by the African Union High-Level Implementation Panel (AUHIP) in Addis Ababa on 25-30 November.

We believe these significant negotiations were advanced through the presentation of new proposals that warranted careful consideration by both sides. We note in particular a detailed proposal by the GoSS that put forth a financial contribution to help the GoS reduce its financial gap after South Sudan's secession. In light of recent developments, we strongly urge the Parties

to reconvene as soon as possible, ahead of the agreed December 20 date, to agree on arrangements for the export of oil. We urge both states to finalize as soon as possible a sustainable agreement that encompasses all outstanding petroleum sector and financial issues.

We further reiterate our strong commitment to continue working with the AUHIP and both governments to reach an agreement on other outstanding post-CPA issues. We urge both governments to immediately implement agreed security and administrative arrangements on Abyei and the border. The withdrawal of all GoS and GoSS armed forces from Abyei, the establishment of the Abyei Area Administration, and the convening of the Abyei Joint Oversight Committee in Abyei are of highest priority and any obstacles to these objectives should be resolved quickly. Swift resolution of these outstanding issues will advance security and prosperity for citizens of both countries. We further call on the parties to refrain from any further destabilizing actions or inflammatory language that might jeopardize the relations between both states, and in that context note with concern the recent and dangerous escalation of military action along the Sudan-South Sudan border.

We commend the efforts of the AUHIP in facilitating these negotiations and wholeheartedly support the AUHIP's continued engagement. We encourage other international stakeholders to play a positive role in engaging with both Sudan and South Sudan to help peacefully resolve outstanding issues and work toward the development of two viable states at peace with one another.

We strongly support the AU Peace and Security Council's call for the AUHIP to continue to prioritize democratization in both Sudan and South Sudan as a sine qua non for stability and equitable governance.

* * * *

2. Côte d'Ivoire

The Security Council adopted seven resolutions on the situation in Côte d'Ivoire in 2011. The United States supported the resolutions and the work of the United Nations Operation in Côte d'Ivoire ("UNOCI"). See *Digest 2005* at 933-34; see also *Digest 2010* at 300-02 for background on the conflict following the November 2010 presidential elections.

On March 9, 2011, President Barack Obama delivered a statement on the violence in Côte d'Ivoire. That statement appears below and is available at www.whitehouse.gov/the-press-office/2011/03/09/statement-president-barack-obama-violence-cote-divoire.

* * * *

I strongly condemn the abhorrent violence against unarmed civilians in Cote d'Ivoire. I am particularly appalled by the indiscriminate killing of unarmed civilians during peaceful rallies, many of them women, including those who were gunned down as they marched in support of the legitimately elected President Alassane Ouattara. Reports indicate that the women were shot to death by security forces loyal to former President Laurent Gbagbo. On March 8—the 100th Anniversary of International Women's Day—we saw pictures of women peacefully rallying with signs that said, "Don't shoot us"—a strong testament to the bravery of women exercising their right of peaceful assembly.

The United States remains deeply concerned about escalating violence, including the deepening humanitarian and economic crisis and its impact in Cote d'Ivoire and neighboring countries. All armed parties in Cote d'Ivoire must make every effort to protect civilians from being targeted, harmed, or killed. The United States reiterates its commitment to work with the international community to ensure that perpetrators of such atrocities be identified and held individually accountable for their actions.

As we have said since the election results in Cote d'Ivoire were certified: the people of Cote d'Ivoire elected Alassane Ouattara as their President, and Laurent Gbagbo lost the election. Former President Gbagbo's efforts to hold on to power at the expense of his own country are an assault on the universal rights of his people, and the democracy that the Cote d'Ivoire deserves. The people of Cote d'Ivoire have extraordinary talent and potential, and they deserve leadership that is responsive to their hopes and aspirations. It is time for former President Gbagbo to heed the will of his people, and to complete a peaceful transition of power to President Ouattara.

* * * *

On March 30, 2011 after the Security Council adopted Resolution 1975, Ambassador Rice delivered remarks, below, in which she urged Laurent Gbagbo to step aside and all parties to restore peace in the country. Ambassador Rice's remarks are also available at <http://usun.state.gov/briefing/statements/2011/159393.htm>.

* * * *

Thank you, Mr. President. The United States welcomes the unanimous adoption of this strong resolution this afternoon. This Council has met on numerous occasions in an attempt to find a resolution to the ongoing crisis. We have strongly condemned the violence. We have urged former President Gbagbo to step aside so that President Ouattara, as the duly-elected President of Cote d'Ivoire, can govern. We stressed our support for UNOCI and its mandate of protecting civilians. And, we have adopted targeted sanctions against those most responsible for obstructing peace.

This resolution sends a strong signal: Mr. Gbagbo and his followers should immediately reject violence and respect the will of the Ivorian people. As violence continues, Cote d'Ivoire stands at a crossroads:

Mr. Gbagbo and his supporters can continue to cling to power, which will only lead to more innocent civilians being wounded and killed, and more diplomatic and economic isolation.

Or Mr. Gbagbo and his followers can finally reject violence and respect the will of the Ivorian people. If this path is chosen, Ivorians can reclaim their country and rebuild a vibrant economy that was once the admiration of all of Africa.

The United States urges this Council to support and work with President Ouattara in his efforts to create a peaceful and prosperous future for all Ivorians, a future based on inclusive government, reunification and reconciliation.

We urge all parties to exercise restraint and to avoid violence against civilians. Now is the time for all Ivorians to embrace the path of peace and to unite in rebuilding Cote d'Ivoire so future generations can enjoy the stability and prosperity that all Ivorians deserve.

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After the arrest of former president Gbagbo on April 11, 2011, Ambassador Rice delivered a statement on the way forward in Cote d'Ivoire. That statement appears below and is available at <http://usun.state.gov/briefing/statements/2011/160486.htm>.

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The United States welcomes the end of former President Laurent Gbagbo's illegitimate claim to power in Cote d'Ivoire. As the international community has said repeatedly, the people of Cote d'Ivoire deserve peace and democracy. They deserve a government that recognizes their fundamental human rights and respects their will. And they deserve to return to the path of prosperity and security. That opportunity begins today.

As the Ivorian government and people work to move beyond the recent crisis, the United States will stand with them. We are ready to help Cote d'Ivoire recover and rebuild, and will support UN efforts to carry on its important peacekeeping and humanitarian work. The United States commends the UN Operation in Cote d'Ivoire (UNOCI) and French forces for the robust implementation of their mandate to protect civilians pursuant to UN Security Council Resolution 1975, and we will continue to strongly support their efforts in this regard.

The U.S. remains profoundly concerned about and condemns persistent violations of fundamental human rights. We support President Alassane Ouattara's affirmation of the need to investigate those who have perpetrated attacks against civilians. All parties should be aware that the actions of their supporters will be scrutinized, alleged human rights abuses and attacks against civilians will be investigated, and perpetrators will be held accountable without regard to which side they may have been aligned.

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3. Georgia

In 2011, the United States continued to support the Geneva Discussions and the efforts of the Organization for Security and Cooperation in Europe ("OSCE") to maintain peace and security in the Abkhazia and South Ossetia regions of Georgia based on agreements reached in 2008. See *Digest 2008* at 863-70, *Digest 2009* at 670-71, and *Digest 2010* at 727-29 for background. On April 30, 2011, State Department Acting Deputy Spokesman Mark C. Toner provided a press statement, available at www.state.gov/r/pa/prs/ps/2011/04/162266.htm, in which he addressed Russian actions with respect to Abkhazia and South Ossetia:

Russia's recent efforts to conclude formal state-to-state agreements with the "de facto" authorities in Abkhazia and South Ossetia during a visit this week to those separatist regions are inconsistent with the principle of territorial integrity and Georgia's internationally recognized borders. The United States remains committed to a peaceful resolution to the conflict in Georgia's separatist regions and the restoration of Georgia's sovereignty and territorial integrity within its internationally recognized borders. We

further call upon all parties to the conflict to fully implement their commitments pursuant to the 2008 Ceasefire Agreement.

On October 13, 2011, Gary Robbins, *Chargé d’Affaires*, U.S. Mission to the OSCE, delivered a statement to the OSCE Permanent Council conveying the position of the United States on these efforts and urging the Russian side to allow access for international observers in Abkhazia and South Ossetia. Ambassador Robbins’ October 13th statement to the OSCE follows and is also available at www.humanrights.gov/2011/10/14/statement-by-charge-d%E2%80%99affaires-robbins-on-the-geneva-discussions-on-georgia/.

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The United States continues to support the Geneva Discussions as an important forum for improving security and humanitarian conditions in Georgia. We urge all of the parties to continue constructive engagement in the Geneva Discussions and the Incident Prevention and Response Mechanisms (IPRMs) in order to foster agreement on international security arrangements, to enhance confidence-building measures, and to promote both strengthened humanitarian initiatives and a sustainable and peaceful resolution to the conflict.

We continue to call on Russia to abide by its commitments under the 2008 ceasefire agreement and its September 2008 implementing measures, including the withdrawal of Russian troops to positions held prior to the start of hostilities and the facilitation of humanitarian access to the Abkhazia and South Ossetia regions of Georgia.

The EU Monitoring Mission in Georgia is a crucial stabilizing factor, and plays a key role in the implementation of the IPRMs. The EUMM also is critical to the international community’s efforts to monitor compliance with the cease-fire and implementing measures. Unfortunately, these efforts cannot be fully realized as long as Russia denies international observers access to the South Ossetia and Abkhazia regions of Georgia.

The United States continues to urge free and unhindered humanitarian access to the South Ossetia and Abkhazia regions of Georgia, as agreed in the August 2008 cease-fire. We call for full respect of all individuals’ human rights in the conflict areas, and for the safe, dignified, and voluntary return of internally displaced persons.

In closing, let me reiterate that the United States remains committed to helping Russia and Georgia find a peaceful resolution to the conflicts in Georgia, and we will continue to support Georgia’s sovereignty, independence, and territorial integrity within its internationally recognized borders.

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Ambassador Robbins reiterated U.S. support for the Geneva Discussions and the call for Russia to honor its commitments under the 2009 ceasefire in a December 15, 2011 statement at the OSCE, following another round of the Geneva Discussions. The full statement is available at www.uspolicy.be/headline/amb-robbins-osce-geneva-discussions-georgia. In particular, the December 15 statement urged Russia to pledge non-use of force:

The United States continues to urge Russia to make a unilateral pledge of Non-Use of Force as Georgia has and we call for a full-fledged, cross-dimensional OSCE presence throughout Georgia including a robust monitoring capacity able to operate unhindered across the administrative boundary lines. We also call for respect of all individuals' human rights and the safe, dignified, and voluntary return of internally displaced persons.

4. Kosovo

The Security Council continued to meet in 2011 to consider reports on the United Nations Administration in Kosovo ("UNMIK") and hear briefings by the Secretary-General's Special Representative and head of UNMIK. Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, delivered a statement at the Security Council's meeting on November 29, 2011, excerpted below, urging continued international cooperation in Kosovo through support for KFOR (NATO's forces in Kosovo), EULEX (the EU's Rule of Law Mission in Kosovo), and the EU-sponsored Dialogue, among other activities of the international community. The full text of the statement is available at <http://usun.state.gov/briefing/statements/2011/177855.htm>.

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... [T]he most recent Secretary General's report on UNMIK highlights the challenges to long-term peace and security in Kosovo and the Balkan region. But the report also highlights the successes Kosovo and the region have made, including the September 2nd agreement by Belgrade and Pristina to recognize each other's customs stamps, as well as ongoing cooperation on cultural heritage projects. Despite recent violence caused by the acts of a few extremists, the United States remains optimistic that Kosovo and Serbia can eventually resolve their differences, and that Kosovo will continue to develop the successful institutions of a democratic nation.

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...[W]e echo the Secretary-General's call for KFOR to continue its efforts to ensure freedom of movement throughout Kosovo. This Council has affirmed that Kosovo is a single customs space. This is fully in accordance with Security Council Resolution 1244 and was a key point in the Secretary General's November 2008 report on UNMIK, a report that the Council welcomed in its presidential statement of November 26, 2008. Kosovo therefore has the right to control its borders and uphold rule of law in full cooperation with the international community. It cannot be considered unilateral action for Kosovo to enforce its customs controls. Moreover, Kosovo also coordinated its activities with the international community, including KFOR and EULEX.

... We call on all actors, including the Serbian government, to cooperate fully with KFOR and EULEX in the immediate removal of the remaining roadblocks, in ensuring proper controls at the borders, and in supporting rule of law through cooperation in the arrests of key criminal suspects. UNMIK can best facilitate these goals by clearly supporting the presence of

Kosovo customs officials at the border gates and emphasizing that Kosovo is a single customs space.

We remain deeply concerned by the violence in northern Kosovo during recent months, including: the murder of a Kosovo Police officer on July 26th; attacks on nine KFOR soldiers on September 27th; injuries to 21 KFOR soldiers on November 23rd to 24th; and on November 25th injuries to over 25 KFOR officers, including two wounded by gunfire while attempting to remove roadblocks that obstruct freedom of movement. It is a serious matter that these incidents occurred while Serbian security structures remain illegally deployed in these areas. Members of this Council should be unequivocal in condemning the violence perpetrated against KFOR and in supporting the mission. Just as any attack on UN peacekeepers is unacceptable, so is any attack on KFOR. My government underscores that KFOR's actions have been and continue to be in complete accordance with its mandate under UN Security Council Resolution 1244. We commend KFOR for using minimal force, in self-defense, to de-escalate the situation and we believe that Serbia's request to the Secretary-General for a special investigation into the events of September 27th is unwarranted.

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My final point ... is that the United States fully supports Ambassador Clint Williamson in his new role as lead prosecutor for the international Special Investigative Task Force. The taskforce will continue EULEX's investigation into the allegations set forth in the report of the Council of Europe Special Rapporteur Dick Marty. EULEX's mandate—as enshrined in Kosovo's constitution and laws and the EU Joint Action—explicitly provides for EULEX to investigate and prosecute serious crimes, such as those alleged in the Marty report, and to do so independently. Further, neighboring states, including Serbia, have offered the task force their full cooperation. We believe there is, therefore, no need for the Council to interfere with EULEX's ongoing investigations.

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5. U.S.-E.U. Framework Agreement on crisis management operations

On May 17, 2011, Secretary Clinton and European Union High Representative for Foreign Affairs and Security Policy Catherine Ashton signed the Framework Agreement between the United States and the European Union on the Participation of the United States in European Union Crisis Management Operations. A State Department Media Note issued on the same day, available at www.state.gov/r/pa/prs/ps/2011/05/163573.htm, described the agreement:

This Agreement provides a legal framework for United States civilians to participate in European Union crisis management missions. The United States previously negotiated an agreement for our participation in the EU's Rule of Law mission (EULEX) in Kosovo and an ad hoc arrangement for our participation in the EU's Security Sector Reform mission (EUSEC) in the Democratic Republic of the Congo. This Agreement eliminates

the need to negotiate entirely new, separate agreements for our future participation in EU missions.

This Agreement is one facet of the broad partnership between the United States and the European Union and strengthens our practical, on-the-ground coordination in crisis situations.

The text of the agreement is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:143:0002:0005:EN:PDF>.

C. CONFLICT AVOIDANCE

1. United States Atrocities Prevention Board

On August 4, 2011, President Obama issued a Directive to multiple agencies within the U.S. government on the creation of an interagency “Atrocities Prevention Board.” Daily Comp. Pres. Docs., 2011 DCPD No. 00549, pp. 1–2. The Directive is excerpted below.

* * * *

Preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States.

Our security is affected when masses of civilians are slaughtered, refugees flow across borders, and murderers wreak havoc on regional stability and livelihoods. America’s reputation suffers, and our ability to bring about change is constrained, when we are perceived as idle in the face of mass atrocities and genocide. Unfortunately, history has taught us that our pursuit of a world where states do not systematically slaughter civilians will not come to fruition without concerted and coordinated effort.

Governmental engagement on atrocities and genocide too often arrives too late, when opportunities for prevention or low-cost, low-risk action have been missed. By the time these issues have commanded the attention of senior policy makers, the menu of options has shrunk considerably and the costs of action have risen.

In the face of a potential mass atrocity, our options are never limited to either sending in the military or standing by and doing nothing. The actions that can be taken are many—they range from economic to diplomatic interventions, and from non-combat military actions to outright intervention. But ensuring that the full range of options is available requires a level of governmental organization that matches the methodical organization characteristic of mass killings.

Sixty-six years since the Holocaust and 17 years after Rwanda, the United States still lacks a comprehensive policy framework and a corresponding interagency mechanism for preventing and responding to mass atrocities and genocide. This has left us ill-prepared to engage early, proactively, and decisively to prevent threats from evolving into large-scale civilian atrocities.

Accordingly, I hereby direct the establishment of an interagency Atrocities Prevention Board within 120 days from the date of this Presidential Study Directive. The primary purpose of the Atrocities Prevention Board shall be to coordinate a whole-of-government approach to

preventing mass atrocities and genocide. By institutionalizing the coordination of atrocity prevention, we can ensure: (1) that our national security apparatus recognizes and is responsive to early indicators of potential atrocities; (2) that departments and agencies develop and implement comprehensive atrocity prevention and response strategies in a manner that allows “red flags” and dissent to be raised to decisionmakers; (3) that we increase the capacity and develop doctrine for our foreign service, armed services, development professionals, and other actors to engage in the full spectrum of smart prevention activities; and (4) that we are optimally positioned to work with our allies in order to ensure that the burdens of atrocity prevention and response are appropriately shared.

To this end, I direct the National Security Advisor to lead a focused interagency study to develop and recommend the membership, mandate, structure, operational protocols, authorities, and support necessary for the Atrocities Prevention Board to coordinate and develop atrocity prevention and response policy. ...

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2. United Nations Peacekeepers’ Role in Preventing Conflict

See Chapter 18.A.1.c.(3).

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Cross References

Combating piracy in Somalia, **Chapter 3.B.8.**

International Criminal Tribunals for the Former Yugoslavia and Rwanda,

Chapter 3.C.

Women’s participation in conflict resolution, **Chapter 6.B.2.a.**

Palestinians’ application to UNESCO and UN, **Chapter 7.B.**

Recognition of South Sudan, **Chapter 9.B.1.**

Sanctions to restore peace and security, **Chapter 16.A.5.**

Protection of civilians in armed conflict, **Chapter 18.A.1.c.(3)**

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. Use of force issues related to specific conflicts

(1) Libya

On March 26, 2011, State Department Legal Adviser Harold Hongju Koh delivered a speech regarding the use of force in Libya at the 105th Annual Meeting of the American Society of International Law in Washington, D.C. Excerpts from Mr. Koh's speech below include his discussion of the justification for the use of force in Libya based on United Nations Security Council Resolution 1973 (2011). U.N. Doc. S/RES/1973. The full text of Mr. Koh's speech is available at www.state.gov/s/l/releases/remarks/159201.htm. Chapter 3 discusses the UN Security Council's referral of the situation in Libya to the International Criminal Court. Chapter 6 discusses Libya's suspension from the Human Rights Council. Chapter 9 discusses recognition and succession of the new regime in Libya. And Chapter 16 discusses the use of sanctions, including by the UN Security Council, in an effort to halt the violence against civilians by the Qadhafi regime in Libya.

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On March 19, 2011, at President Obama's direction, U.S. military forces began a series of strikes in the national security and foreign policy interests of the United States to enforce UN Security Council Resolution 1973. These strikes will be limited in their nature, duration, and scope.

Their explicit purpose is to support an international coalition as it takes all necessary measures to enforce the terms of Resolution 1973 (adopted on March 17, 2011), as part of an international effort authorized by the United Nations Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.

U.S. forces are conducting a limited and well-defined mission in support of international efforts to protect civilians, to prevent a humanitarian disaster, and to set the stage for further action by other coalition partners. U.S. military efforts are discrete and focused on employing unique U.S. military capabilities to set the conditions for our European Allies and Arab partners to continue to carry out the measures authorized by Resolution 1973. The United States has not deployed ground forces into Libya and will not do so. U.S. forces have targeted the Qaddafi regime's air defense systems, command and control structures, and other capabilities of Qaddafi's armed forces used to attack civilians and civilian populated areas. We are working

with our allies to transition to NATO and other partners the principal command and control of this effort and to ensure the continuation of activities necessary to realize the objectives of UN Security Council Resolutions 1970 (adopted on February 26, 2011) and 1973.

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These United States military actions rest on ample international legal authority. Chapter VII of the United Nations Charter grants authority to the Security Council to decide what measures shall be taken to maintain or restore international peace and security where it determines the existence of any threat to the peace, breach of the peace or act of aggression (Article 39). Articles 41 and 42 further specify that the Security Council may take such action by air, sea and land forces as may be necessary to maintain or restore international peace and security. Acting under Chapter VII, in Resolution 1973, the Security Council determined that the situation in the Libyan Arab Jamahiriya constitutes a threat to international peace and security (PP21), and: (1) in operative paragraphs 6 to 8 of the resolution imposed a No-Fly Zone in the air space of the Libyan Arab Jamahiriya in order to help protect civilians, and authorized states to take “all necessary measures” to enforce that No-Fly Zone in accordance with the Resolution, (2) in operative paragraph 4 authorized Member States to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory; and (3) in operative paragraph 13 authorized Member States to use all measures commensurate to the specific circumstances to carry out inspections aimed at the enforcement of the arms embargo. Under the Security Council authorizations, Member States may also work through regional organizations or arrangements and with local partners who share the goal of preventing attacks on civilians or civilian populated areas.

Resolution 1973 sent Qaddafi a very clear message that a ceasefire must be implemented immediately. In addition, President Obama made clear that Qaddafi was to stop his forces from advancing on Benghazi, to pull them back from Ajdabiya, Misrata, and Zawiyah, and to establish water, electricity, and gas supplies to all areas. The Resolutions also made clear that humanitarian assistance had to be allowed to reach the people of Libya. Although Qaddafi’s Foreign Minister announced a ceasefire, Qaddafi and his forces instead continued attacks on Misrata, and advanced on Benghazi.

Qaddafi also threatened civilians living in areas that refused to acquiesce to his threats, declaring, “We will come house by house, room by room. . . . We will find you in your closets. We will have no mercy and no pity.” As President Obama said in his weekly address “I firmly believe that when innocent people are being brutalized; when someone like Qaddafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save thousands of lives—then it’s in our national interest to act. And, it’s our responsibility. This is one of those times.”

Qaddafi’s defiance of the Arab League as well as the broader international community represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region. The United States supports the Security Council’s conclusion that Qaddafi’s continued attacks and threats against civilians and civilian populated areas are of grave concern to neighboring Arab nations and constitute a threat to the region and to international peace and security. His illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to

neighboring countries, thereby destabilizing the peace and security of the region. Qaddafi has forfeited his responsibility to protect his own citizens and created a serious need for immediate humanitarian assistance and protection, with any further delay only putting more civilians at risk. Left unaddressed, the growing instability in Libya could ignite wider instability in the Middle East with dangerous consequences to the national security interests of the United States, which made these actions necessary.

The President directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to his constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. The President has well-recognized authority to authorize a mission of this kind, which as he explained, will be time-limited, well-defined, discrete, and aimed at preventing an imminent humanitarian catastrophe that directly implicates the national security and foreign policy interests of the United States. The Administration has been closely consulting Congress regarding the situation in Libya, including in a session with the bipartisan leadership that the President conducted before his announcement. Before Resolution 1973 was adopted, on March 1, 2011 the Senate adopted its own resolution by unanimous consent (S. Res. 85) calling for a No-Fly zone. The President has acted consistently with the reporting requirements in the War Powers Resolution, and has furthermore indicated that he is committed to ongoing, close consultations with Congress as the situation develops.

In sum, the United States' military actions in Libya are lawful.

On March 28, 2011, President Obama summarized U.S. actions with respect to Libya in an "Address to the Nation," at the National Defense University. Daily Comp. Pres. Docs., 2011 DCPD No. 00206. President Obama's speech is excerpted below.

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For generations, the United States of America has played a unique role as an anchor of global security and as an advocate for human freedom. Mindful of the risks and costs of military action, we are naturally reluctant to use force to solve the world's many challenges. But when our interests and values are at stake, we have a responsibility to act. That's what happened in Libya over the course of these last 6 weeks.

Libya sits directly between Tunisia and Egypt, two nations that inspired the world when their people rose up to take control of their own destiny. For more than four decades, the Libyan people have been ruled by a tyrant, Muammar Qadhafi. He has denied his people freedom, exploited their wealth, murdered opponents at home and abroad, and terrorized innocent people around the world, including Americans who were killed by Libyan agents.

Last month, Qadhafi's grip of fear appeared to give way to the promise of freedom. In cities and towns across the country, Libyans took to the streets to claim their basic human rights. As one Libyan said, "For the first time we finally have hope that our nightmare of 40 years will soon be over."

Faced with this opposition, Qadhafi began attacking his people. As President, my immediate concern was the safety of our citizens, so we evacuated our Embassy and all Americans who sought our assistance. Then we took a series of swift steps in a matter of days to answer Qadhafi's aggression. We froze more than \$33 billion of Qadhafi's regime's assets. Joining with other nations at the United Nations Security Council, we broadened our sanctions,

imposed an arms embargo, and enabled Qadhafi and those around him to be held accountable for their crimes. I made it clear that Qadhafi had lost the confidence of his people and the legitimacy to lead, and I said that he needed to step down from power.

In the face of the world's condemnation, Qadhafi chose to escalate his attacks, launching a military campaign against the Libyan people. Innocent people were targeted for killing. Hospitals and ambulances were attacked. Journalists were arrested, sexually assaulted, and killed. Supplies of food and fuel were choked off. Water for hundreds of thousands of people in Misurata was shut off. Cities and towns were shelled, mosques were destroyed, and apartment buildings reduced to rubble. Military jets and helicopter gunships were unleashed upon people who had no means to defend themselves against assaults from the air.

Confronted by this brutal repression and a looming humanitarian crisis, I ordered warships into the Mediterranean. European allies declared their willingness to commit resources to stop the killing. The Libyan opposition and the Arab League appealed to the world to save lives in Libya. And so at my direction, America led an effort with our allies at the United Nations Security Council to pass a historic resolution that authorized a no-fly zone to stop the regime's attacks from the air and further authorized all necessary measures to protect the Libyan people.

Ten days ago, having tried to end the violence without using force, the international community offered Qadhafi a final chance to stop his campaign of killing or face the consequences. Rather than stand down, his forces continued their advance, bearing down on the city of Benghazi, home to nearly 700,000 men, women, and children who sought their freedom from fear.

At this point, the United States and the world faced a choice. Qadhafi declared he would show no mercy to his own people. He compared them to rats and threatened to go door to door to inflict punishment. In the past, we have seen him hang civilians in the streets and kill over a thousand people in a single day. Now we saw regime forces on the outskirts of the city. We knew that ...if we waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world.

It was not in our national interest to let that happen. I refused to let that happen. And so 9 days ago, after consulting the bipartisan leadership of Congress, I authorized military action to stop the killing and enforce U.N. Security Council Resolution 1973.

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In this effort, the United States has not acted alone. Instead, we have been joined by a strong and growing coalition. This includes our closest allies—nations like the United Kingdom, France, Canada, Denmark, Norway, Italy, Spain, Greece, and Turkey—all of whom have fought by our sides for decades. And it includes Arab partners like Qatar and the United Arab Emirates, who have chosen to meet their responsibilities to defend the Libyan people.

To summarize then, in just 1 month, the United States has worked with our international partners to mobilize a broad coalition, secure an international mandate to protect civilians, stop an advancing army, prevent a massacre, and establish a no-fly zone with our allies and partners. To lend some perspective on how rapidly this military and diplomatic response came together, when people were being brutalized in Bosnia in the 1990s, it took the international community more than a year to intervene with air power to protect civilians. It took us 31 days.

Moreover, we've accomplished these objectives consistent with the pledge that I made to the American people at the outset of our military operations. I said that America's role would be

limited, that we would not put ground troops into Libya, that we would focus our unique capabilities on the front end of the operation and that we would transfer responsibility to our allies and partners. Tonight we are fulfilling that pledge.

Our most effective alliance, NATO, has taken command of the enforcement of the arms embargo and the no-fly zone. Last night NATO decided to take on the additional responsibility of protecting Libyan civilians. This transfer from the United States to NATO will take place on Wednesday. Going forward, the lead in enforcing the no-fly zone and protecting civilians on the ground will transition to our allies and partners, and I am fully confident that our coalition will keep the pressure on Qadhafi's remaining forces.

In that effort, the United States will play a supporting role, including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications. Because of this transition to a broader, NATO-based coalition, the risk and cost of this operation—to our military and to American taxpayers—will be reduced significantly.

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... [M]uch of the debate in Washington has put forward a false choice when it comes to Libya. On the one hand, some question why America should intervene at all, even in limited ways, in this distant land. They argue that there are many places in the world where innocent civilians face brutal violence at the hands of their government, and America should not be expected to police the world, particularly when we have so many pressing needs here at home.

It's true that America cannot use our military wherever repression occurs. And given the costs and risks of intervention, we must always measure our interests against the need for action. But that cannot be an argument for never acting on behalf of what's right. In this particular country, Libya, at this particular moment, we were faced with the prospect of violence on a horrific scale. We had a unique ability to stop that violence: an international mandate for action, a broad coalition prepared to join us, the support of Arab countries, and a plea for help from the Libyan people themselves. We also had the ability to stop Qadhafi's forces in their tracks without putting American troops on the ground.

To brush aside America's responsibility as a leader, and more profoundly, our responsibilities to our fellow human beings under such circumstances would have been a betrayal of who we are. Some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different. And as President, I refused to wait for the images of slaughter and mass graves before taking action.

Moreover, America has an important strategic interest in preventing Qadhafi from overrunning those who oppose him. A massacre would have driven thousands of additional refugees across Libya's borders, putting enormous strains on the peaceful yet fragile transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power. The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security. So while I will never minimize the costs involved in military action, I am convinced that a failure to act in Libya would have carried a far greater price for America.

Now, just as there are those who have argued against intervention in Libya, there are others who have suggested that we broaden our military mission beyond the task of protecting

the Libyan people and do whatever it takes to bring down Qadhafi and usher in a new government.

Of course, there is no question that Libya and the world would be better off with Qadhafi out of power. I, along with many other world leaders, have embraced that goal and will actively pursue it through nonmilitary means. But broadening our military mission to include regime change would be a mistake.

The task that I assigned our forces—to protect the Libyan people from immediate danger and to establish a no-fly zone—carries with it a U.N. mandate and international support. It's also what the Libyan opposition asked us to do. If we tried to overthrow Qadhafi by force, our coalition would splinter. We would likely have to put U.S. troops on the ground to accomplish that mission or risk killing many civilians from the air. The dangers faced by our men and women in uniform would be far greater. So would the costs and our share of the responsibility for what comes next.

To be blunt, we went down that road in Iraq. Thanks to the extraordinary sacrifices of our troops and the determination of our diplomats, we are hopeful about Iraq's future. But regime change there took 8 years, thousands of American and Iraqi lives, and nearly a trillion dollars. That is not something we can afford to repeat in Libya.

As the bulk of our military effort ratchets down, what we can do, and will do, is support the aspirations of the Libyan people. We have intervened to stop a massacre, and we will work with our allies and partners to maintain the safety of civilians. We will deny the regime arms, cut off its supplies of cash, assist the opposition, and work with other nations to hasten the day when Qadhafi leaves power. ...

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On June 28, 2011, Mr. Koh testified before the Foreign Relations Committee of the U.S. Senate on the use of force in Libya, which, he explained, was consistent with the United States Constitution, the War Powers Resolution, and international law. Mr. Koh's written testimony, excerpted below (with most footnotes omitted), is available in full at www.state.gov/s/l/releases/remarks/167250.htm.

* * * *

We believe that the President is acting lawfully in Libya, consistent with both the Constitution and the War Powers Resolution, as well as with international law. Our position is carefully limited to the facts of the present operation, supported by history, and respectful of both the letter of the Resolution and the spirit of consultation and collaboration that underlies it...

...Faced with brutal attacks and explicit threats of further imminent attacks by Muammar Qadhafi against his own people, the United States and its international partners acted with unprecedented speed to secure a mandate, under Resolution 1973, to mobilize a broad coalition to protect civilians against attack by an advancing army and to establish a no-fly zone. In so doing, President Obama helped prevent an imminent massacre in Benghazi, protected critical U.S. interests in the region, and sent a strong message to the people not just of Libya—but of the

entire Middle East and North Africa—that America stands with them at this historic moment of transition.

From the start, the Administration made clear its commitment to acting consistently with both the Constitution and the War Powers Resolution. The President submitted a report to Congress, consistent with the War Powers Resolution, within 48 hours of the commencement of operations in Libya. He framed our military mission narrowly, directing, among other things, that no ground troops would be deployed (except for necessary personnel recovery missions), and that U.S. armed forces would transition responsibility for leading and conducting the mission to an integrated NATO command. On April 4, 2011, U.S. forces did just that, shifting to a constrained and supporting role in a multinational civilian protection mission—in an action involving no U.S. ground presence or, to this point, U.S. casualties—authorized by a carefully tailored U.N. Security Council Resolution. As the War Powers Resolution contemplates, the Administration has consulted extensively with Congress about these operations, participating in more than ten hearings, thirty briefings, and dozens of additional exchanges since March 1—an interbranch dialogue that my testimony today continues.

This background underscores the limits to our legal claims. Throughout the Libya episode, the President has never claimed the authority to take the nation to war without Congressional authorization, to violate the War Powers Resolution or any other statute, to violate international law, to use force abroad when doing so would not serve important national interests, or to refuse to consult with Congress on important war powers issues. The Administration recognizes that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting interbranch dialogue and deliberation on these critical matters. The President has expressed his strong desire for Congressional support, and we have been working actively with Congress to ensure enactment of appropriate legislation.

* * * *

Where, against this background, does the War Powers Resolution fit in? The legal debate has focused on the Resolution's 60-day clock, which directs the President—absent express Congressional authorization (or the applicability of other limited exceptions) and following an initial 48-hour reporting period—to remove United States Armed Forces within 60 days from “hostilities” or “situations where imminent involvement in hostilities is clearly indicated by the circumstances.” But as virtually every lawyer recognizes, the operative term, “hostilities,” is an ambiguous standard, which is nowhere defined in the statute. Nor has this standard ever been defined by the courts or by Congress in any subsequent war powers legislation. Indeed, the legislative history of the Resolution makes clear there was no fixed view on exactly what the term “hostilities” would encompass. Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the Resolution a “one size fits all” straitjacket that would operate mechanically, without regard to particular circumstances.

From the start, lawyers and legislators have disagreed about the meaning of this term and the scope of the Resolution's 60-day pullout rule. Application of these provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad, without guidance from the courts, involving a Resolution passed by a Congress that could not have envisioned many of the operations in which the United States has since

become engaged. Because the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes “hostilities” for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions. Both branches have recognized that different situations may call for different responses, and that an overly mechanical reading of the statute could lead to unintended automatic cutoffs of military involvement in cases where more flexibility is required.

In the nearly forty years since the Resolution’s enactment, successive Administrations have thus started from the premise that the term “hostilities” is “definable in a meaningful way only in the context of an actual set of facts.”⁹ And successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law’s meaning over time. By adopting this approach, the two branches have sought to avoid construing the statute mechanically, divorced from the realities that face them.

In this case, leaders of the current Congress have stressed this very concern in indicating that they do not believe that U.S. military operations in Libya amount to the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day pullout provision. The historical practice supports this view. In 1975, Congress expressly invited the Executive Branch to provide its best understanding of the term “hostilities.” My predecessor Monroe Leigh and Defense Department General Counsel Martin Hoffmann responded that, as a general matter, the Executive Branch understands the term “to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.” On the other hand, as Leigh and Hoffmann suggested, the term should not necessarily be read to include situations where the nature of the mission is limited (i.e., situations that do not “involve the full military engagements with which the Resolution is primarily concerned”); where the exposure of U.S. forces is limited (e.g., situations involving “sporadic military or paramilitary attacks on our armed forces stationed abroad,” in which the overall threat faced by our military is low); and where the risk of escalation is therefore limited. Subsequently, the Executive Branch has reiterated the distinction between full military encounters and more constrained operations, stating that “intermittent military engagements” do not require withdrawal of forces under the Resolution’s 60-day rule.¹² In the thirty-six years since Leigh and Hoffmann provided their analysis, the Executive Branch has repeatedly articulated and applied these foundational understandings. The President was thus operating within this longstanding tradition of Executive Branch interpretation when he relied on these understandings in his legal explanation to Congress on June 15, 2011.

In light of this historical practice, a combination of four factors present in Libya suggests that the current situation does not constitute the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day automatic pullout provision.

⁹ 1975 Leigh-Hoffmann Letter [Letter from State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann to Chairman Clement J. Zablocki (June 5, 1975), reprinted in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the H. Comm. on International Relations, 94th Cong. (1975)*], at 38.

¹² Letter from Assistant Secretary of State for Legislative Affairs Wendy R. Sherman to Representative Benjamin Gilman, reprinted in 139 Cong. Rec. H7095 (daily ed. Sept. 28, 1993).

First, the mission is limited: By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council Resolution tailored to that limited purpose. This is a very unusual set of circumstances, not found in any of the historic situations in which the “hostilities” question was previously debated, from the deployment of U.S. armed forces to Lebanon, Grenada, and El Salvador in the early 1980s, to the fighting with Iran in the Persian Gulf in the late 1980s, to the use of ground troops in Somalia in 1993. Of course, NATO forces as a whole are more deeply engaged in Libya than are U.S. forces, but the War Powers Resolution’s 60-day pullout provision was designed to address the activities of the latter.

Second, the exposure of our armed forces is limited: To date, our operations have not involved U.S. casualties or a threat of significant U.S. casualties. Nor do our current operations involve active exchanges of fire with hostile forces, and members of our military have not been involved in significant armed confrontations or sustained confrontations of any kind with hostile forces. Prior administrations have not found the 60-day rule to apply even in situations where significant fighting plainly did occur, as in Lebanon and Grenada in 1983 and Somalia in 1993. By highlighting this point, we in no way advocate a legal theory that is indifferent to the loss of non-American lives. But here, there can be little doubt that the greatest threat to Libyan civilians comes not from NATO or the United States military, but from Qadhafi. The Congress that adopted the War Powers Resolution was principally concerned with the safety of U.S. forces, and with the risk that the President would entangle them in an overseas conflict from which they could not readily be extricated. In this instance, the absence of U.S. ground troops, among other features of the Libya operation, significantly reduces both the risk to U.S. forces and the likelihood of a protracted entanglement that Congress may find itself practically powerless to end.

Third, the risk of escalation is limited: U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope. ... Prior administrations have found an absence of “hostilities” under the War Powers Resolution in situations ranging from Lebanon to Central America to Somalia to the Persian Gulf tanker controversy, although members of the United States Armed Forces were repeatedly engaged by the other side’s forces and sustained casualties in volatile geopolitical circumstances, in some cases running a greater risk of possible escalation than here.

Fourth and finally, the military means we are using are limited: ...The violence that U.S. armed forces have directly inflicted or facilitated after the handoff to NATO has been modest in terms of its frequency, intensity, and severity. The air-to-ground strikes conducted by the United States in Libya are a far cry from the bombing campaign waged in Kosovo in 1999.... The U.S. contribution to NATO is likewise far smaller than it was in the Balkans in the mid-1990s Here, by contrast, the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets. A very significant majority of the overall sorties are being flown by our coalition partners, and the overwhelming majority of strike sorties are being flown by our partners. American strikes have been confined, on an as-needed basis, to the suppression of enemy air defenses to enforce the no-fly zone, and to limited strikes by Predator unmanned aerial vehicles against discrete targets in support of the civilian protection mission; since the handoff to NATO, the total number of U.S. munitions dropped has been a tiny fraction of the number dropped in Kosovo. All NATO targets, moreover, have been clearly linked to the

Qadhafi regime's systematic attacks on the Libyan population and populated areas, with target sets engaged only when strictly necessary and with maximal precision.

Had any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn. But the unusual confluence of these four factors, in an operation that was expressly designed to be limited—limited in mission, exposure of U.S. troops, risk of escalation, and military means employed—led the President to conclude that the Libya operation did not fall within the War Powers Resolution's automatic 60-day pullout rule.

* * * *

Nor are we in a “war” for purposes of Article I of the Constitution. As the Office of Legal Counsel concluded in its April 1, 2011 opinion,²⁴ under longstanding precedent the President had the constitutional authority to direct the use of force in Libya, for two main reasons. First, he could reasonably determine that U.S. operations in Libya would serve important national interests in preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. Second, the military operations that the President anticipated ordering were not sufficiently extensive in “nature, scope, and duration” to constitute a “war” requiring prior specific Congressional approval under the Declaration of War Clause. Although time has passed, the nature and scope of our operations have not evolved in a manner that would alter that conclusion. To the contrary, since the transfer to NATO command, the U.S. role in the mission has become even more limited.

Reasonable minds may read the Constitution and the War Powers Resolution differently—as they have for decades. Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us, which is not one of law but of policy: Will Congress provide its support for NATO's mission in Libya at this pivotal juncture, ensuring that Qadhafi does not regain the upper hand against the people of Libya? The President has repeatedly stated that it is better to take military action, even in limited scenarios such as this, with strong Congressional engagement and support. However we construe the War Powers Resolution, we can all agree that it serves only Qadhafi's interest for the United States to withdraw from this NATO operation before it is finished.

* * * *

(2) Conflict with al-Qaida

(i) U.S operation against Usama bin Laden

On May 1, 2011, President Obama announced that the United States had “conducted an operation that killed Usama bin Laden, the leader of al-Qaida, and a terrorist who's responsible for the murder of thousands of innocent men, women, and children.” Daily Comp. Pres. Docs. , 2011 DCPD No. 00314. In that announcement, President Obama

²⁴ Office of Legal Counsel, U.S. Dep't of Justice, President's Authority to Use Military Force in Libya, www.justice.gov/olc/2011/authority-military-use-in-libya.pdf (Apr. 1, 2011).

described the operation, which followed months of work by the U.S. intelligence community to pinpoint bin Laden's location in a compound in Pakistan:

Today, at my direction, the United States launched a targeted operation against that compound in Abbottabad, Pakistan. A small team of Americans carried out the operation with extraordinary courage and capability. No Americans were harmed. They took care to avoid civilian casualties. After a firefight, they killed Usama bin Laden and took custody of his body.

President Obama went on to explain:

Over the years, I've repeatedly made clear that we would take action within Pakistan if we knew where bin Laden was. That is what we've done. But it's important to note that our counterterrorism cooperation with Pakistan helped lead us to bin Laden and the compound where he was hiding. Indeed, bin Laden had declared war against Pakistan as well and ordered attacks against the Pakistani people.

Mr. Koh provided the views of the U.S. government on the lawfulness of the operation against bin Laden in a May 19, 2011 post on the blog *Opinio Juris*, available at <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>. Mr. Koh's post began with excerpts from his 2010 address to the Annual Meeting of the American Society of International Law, covered in the *2010 Digest* at 715-19. The continuation of Mr. Koh's post appears below.

* * * *

Given bin Laden's unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented. Under these circumstances, there is no question that he presented a lawful target for the use of lethal force. By enacting the AUMF [2001 Authorization for Use of Military Force], Congress expressly authorized the President to use military force "against ... *persons* [such as bin Laden, whom the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States by such ... persons" (emphasis added). Moreover, the manner in which the U.S. operation was conducted—taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—followed the principles of distinction and proportionality described above, and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm's way. Finally, consistent with the laws of

armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.

In sum, the United States acted lawfully in carrying out its mission against Osama bin Laden.

* * * *

(ii) Nature and geographic scope of conflict with al-Qaida

On September 16, 2011, John O. Brennan, Assistant to the President of the United States for Homeland Security and Counterterrorism, delivered remarks at Harvard Law School entitled, “Strengthening our Security by Adhering to our Values and Laws.” Excerpts from Mr. Brennan’s remarks appear below. The full text is available at www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

* * * *

...[T]he death of Usama Bin Laden marked a strategic milestone in our effort to defeat al-Qa’ida. Unfortunately, Bin Laden’s death, and the death and capture of many other al-Qa’ida leaders and operatives, does not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, al-Qa’ida, its affiliates and its adherents remain the preeminent security threat to our nation.

* * * *

Guiding principles

In the face of this ongoing and evolving threat, the Obama Administration has worked to establish a counterterrorism framework that has been effective in enhancing the security of our nation. This framework is guided by several core principles.

* * * *

...[A]nd the principle that guides all our actions, foreign and domestic—we will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say “all our actions,” that includes covert actions, which we undertake under the authorities provided to us by Congress. President Obama has directed that all our actions—even when conducted out of public view—remain consistent with our laws and values.

For when we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they’re more likely to join us in

taking swift and decisive action against terrorists, and they're more likely to turn over suspected terrorists who are plotting to attack us, along with the evidence needed to prosecute them.

When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the twisted worldview offered by al-Qa'ida. Where terrorists offer injustice, disorder and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.

... Over the past two and a half years, we have put in place an approach—both here at home and abroad—that will enable this Administration and its successors, in cooperation with key partners overseas, to deal with the threat from al-Qa'ida, its affiliates, and its adherents in a forceful, effective and lasting way.

In keeping with our guiding principles, the President's approach has been pragmatic—neither a wholesale overhaul nor a wholesale retention of past practices. Where the methods and tactics of the previous administration have proven effective and enhanced our security, we have maintained them. Where they did not, we have taken concrete steps to get us back on course.

... So with the time I have left, I want to touch on a few specific topics that illustrate how our adherence to the rule of law advances our national security.

Nature and geographic scope of the conflict

First, our definition of the conflict. As the President has said many times, we are at war with al-Qa'ida. In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa'ida seeks to attack us again. Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self defense.

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

That does not mean we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the “hot” battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an “imminent” threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define “imminence.”

We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, al-Qa’ida does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.

The convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies—who, in ways public and private, take great risks to aid us in this fight. But their participation must be consistent with their laws, including their interpretation of international law. Again, we will never abdicate the security of the United States to a foreign country or refrain from taking action when appropriate. But we cannot ignore the reality that cooperative counterterrorism activities are a key to our national defense. The more our views and our allies’ views on these questions converge, without constraining our flexibility, the safer we will be as a country.

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b. Bilateral agreements and arrangements

(1) Special measures agreement with Japan

On April 1, 2011, the “Agreement between the United States of America and Japan concerning new special measures relating to Article XXIV of the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, regarding facilities and areas and the status of United States armed forces in Japan” (“Special Measures Agreement”) entered into force. The Special Measures Agreement was signed on January 21, 2011 and is available at www.state.gov/s/l/c8183.htm.

(2) Military vehicle transit agreement with Uzbekistan

On November 17, 2011, representatives of the U.S. Department of Defense and the Ministry of Defense of the Republic of Uzbekistan, signed the Agreement between the Department of Defense of the United States of America and the Government of the Republic of Kazakhstan on procedures for transit through the territory of the Republic of Uzbekistan of motorized wheeled armored vehicles (not fitted with weapons) in connection with the participation of the United States of America in efforts to ensure the security, stabilization, and reconstruction of the Islamic Republic of Afghanistan. The agreement entered into force on December 15, 2011.

(3) Cargo ground transit agreement with Uzbekistan

Also on November 17, 2011, representatives of the U.S. Department of Defense and the Ministry of Defense of the Republic of Uzbekistan, signed the Agreement between the Department of Defense of the United States of America and the Government of the Republic of Uzbekistan on the procedure for ground transit of cargo shipped from the Islamic Republic of Afghanistan through the territory of the Republic of Uzbekistan in connection with the participation of the United States of America in efforts to ensure the security, stabilization, and reconstruction of the Islamic Republic of Afghanistan with mandatory involvement of the State Joint Stock Railway Company “Uzbekiston Temir Yullari.” The agreement entered into force on December 15, 2011.

c. International humanitarian law*(1) Additional Protocols to 1949 Geneva Conventions*

On March 7, 2011, Secretary of State Hillary Rodham Clinton announced that the Obama administration was seeking advice and consent of the U.S. Senate to ratify Additional Protocol II to the 1949 Geneva Conventions. She also announced that the United States would adhere, out of a sense of legal obligation, to the norms in Article 75 of Additional Protocol I to the Geneva Conventions. Secretary Clinton’s press statement, excerpted below, is available at www.state.gov/secretary/rm/2011/03/157827.htm. See section A.3.a.(1), below, for discussion of the March 7 White House fact sheet that also discussed the administration’s support for Additional Protocol II and Article 75.

* * * *

Today we are informing the Chair and Ranking Member of the Senate Foreign Relations Committee that we intend to seek, as soon as practicable, Senate advice and consent to ratification of the Additional Protocol II to the 1949 Geneva Conventions, which elaborates upon safeguards provided in Common Article 3 and includes more detailed standards regarding fair treatment and fair trial.

Ratifying Protocol II will strengthen our national security and advance our interests and values. It is fully consistent with current military practice and would improve America’s ability to maintain strong coalition cooperation in ongoing and future operations, as 165 other countries have now ratified the treaty.

The second step we are taking is to declare that as of today, the United States, out of a sense of legal obligation, will adhere to the set of norms in Article 75 of Protocol I in international armed conflicts. Article 75 sets forth humane treatment and fair trial safeguards for certain persons detained by opposing forces in international armed conflict and was praised by President Reagan’s Joint Chiefs of Staff as “militarily advantageous insofar as it might make mistreatment of captured U.S. military personnel more difficult to justify in future conflicts.”

These steps we take today are not about who our enemies are, but about who we are: a nation committed to providing all detainees in our custody with humane treatment. We are reaffirming that the United States abides by the rule of law in the conduct of armed conflicts and remains committed to the development and maintenance of humanitarian protections in those conflicts.

* * * *

(2) Affirmation of U.S. commitment to humanitarian law at Red Cross conference

On November 28, 2011, Mr. Koh delivered remarks at the 31st International Conference of the Red Cross and Red Crescent in Geneva. Mr. Koh reviewed the progress made by the United States in acceding to international instruments on humanitarian law, including the decision to seek ratification of Additional Protocol II, as discussed above. Mr. Koh's remarks, excerpted below, are available in full at <http://geneva.usmission.gov/2011/11/28/icrc-conference/>.

* * * *

As the State Department's Legal Adviser, I come here today to reaffirm the United States' deep and abiding commitment to international humanitarian law. Ten years after the tragic attacks of September 11th, we continue to face real threats. During the last decade, the United States has learned important lessons, and has worked very hard to ensure that we conduct all aspects of armed conflict—in particular, detention operations—in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States. As President Obama reaffirmed in his 2009 Nobel Prize Lecture, “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct... . [E]ven as we confront a vicious adversary that abides by no rules...the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength.”

The United States appreciates the ICRC's vigilant efforts to identify strategies to strengthen the implementation of international humanitarian law. We share the ICRC's conclusions that international humanitarian law remains the appropriate framework for regulating the conduct of parties to international and non-international armed conflicts, and that those future efforts should focus principally on promoting greater compliance with existing legal frameworks. Because customary law derives not from aspirational pronouncements, but from State practice, it remains important that the development of international humanitarian law should continue to be led by States.

Because we are committed both to the humane treatment of those detained in the course of armed conflict, and to the effectiveness and legitimacy of a U.S. national security policy ruled by law, the U.S. Government announced earlier this year our support for two additional components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions. We have urged our Senate to take action toward ratification of Additional Protocol II as soon as practicable. And acting out of a sense of legal obligation, my government has committed to treat

the fundamental humane treatment principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict.

I am also pleased to report that the United States has fulfilled the pledge it made four years ago at the 30th International Conference—namely, to ratify five treaties that promote respect for international humanitarian law and enhance humanitarian protections during armed conflict:

- The 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict;
- Amendment to Article 1 of the Convention on Conventional Weapons; and,
- Three CCW protocols: Protocol III on “Incendiary Weapons;” Protocol IV on “Blinding Laser Weapons;” and Protocol V on “Explosive Remnants of War.”

* * * *

In closing, Mr. Chairman, the United States Government is pleased to participate in this 31st International Conference of the Red Cross and Red Crescent because we share your unshakeable commitment to humanitarian values and international law. War does not silence law. Nor do we consider these Conventions quaint or outmoded. To the contrary, the Geneva Conventions are as vital today as when they were first conceived. That is why the United States will always be your staunch partner in this critically important ongoing effort to ensure the implementation of the laws of war in furtherance of our shared humanitarian values.

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(3) Protection of civilians in armed conflict

On November 9, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, spoke at a Security Council meeting on the protection of civilians in armed conflict. In her remarks, Ambassador Rice identified five areas for improving efforts to protect civilians. Ambassador Rice’s remarks, excerpted below, are available in full at <http://usun.state.gov/briefing/statements/2011/176905.htm>.

* * * *

Mr. President, protection of civilians is at the heart of what we should be doing as a Council. In the past year, we have made significant progress in operationalizing norms on the protection of civilians. This Council played a critical role in protecting the people of Côte d’Ivoire in the aftermath of their election. When Muammar Qadhafi moved to make good on his promises to massacre civilians in his own country, this Council acted.

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Overall, the United Nations and this Council face challenges both of will and capacity. To build our capacity to protect civilians, we believe the United Nations should advance on five fronts.

First, we must strengthen early-warning systems to detect and draw attention to threats against civilians, especially where the UN already has a significant presence on the ground. Humanitarian workers are often the first to sound the alarm bell. UN peacekeeping personnel have an obligation to do so as well. We have seen some recent promising examples of early-warning and prevention strategies in peacekeeping missions. For example, the UN Mission in South Sudan, with the support of the UN Country Team, mobilized a response to escalating tensions in Jonglei state, including consultations with community leaders and government authorities. This early-warning system may well have helped prevent retaliatory intercommunal violence.

We encourage such early-warning activity in other missions, as part of an overall mission-wide strategy for the protection of civilians. Such strategies can only succeed if they rely on strengthening mission personnel's understanding of and communications with the host communities. A mission-wide strategy also needs to provide peacekeepers with the necessary equipment and training as well as their resolve to use all means at their disposal, including force where necessary and so mandated. My government welcomes the UN's development of training materials focused on sexual and gender-based violence, as well as other tools to help missions improve their protection strategies. The United States helps the UN to survey current practices and has initiated a workshop for missions with civilian-protection mandates.

Second, where prevention has failed, we must bring the evidence of atrocities to light. That is easier to do when human-rights investigators are already on the ground as part of a peace operation or human rights presence. But even where such missions are not present, there are several options available that we can rely upon, such as fact-finding missions, special rapporteurs and commissions of inquiry. And the membership must be ready to take action on such information in this chamber, at the Human Rights Council, and in the General Assembly.

Third, the Security Council can impose targeted sanctions—such as asset freezes and travel bans—on individuals responsible for ordering and committing violence against civilians. Full and effective sanctions implementation can be an extremely useful tool to limit the ability of these individuals to prey on vulnerable populations.

Fourth, we must support societies that have been ravaged by atrocities to strengthen their domestic accountability and, when necessary, to enable international courts to bring those leaders responsible for atrocities to justice, so that all people can live under the protection of law. We have seen firsthand the consequences when those who direct violence against civilians are not held to account—as in the case of Walikale in Congo, where over 350 civilians were raped, but the prosecution by Congolese authorities of alleged perpetrators is still pending 15 months later. Since then, soldiers have continued to commit mass rapes in North and South Kivu, and the number of rapes committed by civilians has increased as well.

Finally, in order to see justice through, from beginning to end, at the international and national levels, we must ensure protection for victims, witnesses, and judicial officers. For example, in the DRC, the U.S. is supporting MONUSCO's witness-protection project for high profile and sensitive cases against perpetrators of rape, as well as providing support for the Mission's Prosecution Support Cells.

The United Nations has learned valuable lessons in all of these areas in recent years and the United States is studying them carefully right now within the context of the Presidential

Study Directive on Mass Atrocities, which President Obama issued in August of this year.* We look forward to consulting with our fellow Council members and partners throughout the UN system as we continue our work on it.

In conclusion, Mr. President, I'd like to commend again the brave work of the United Nations and the tens of thousands of local and international UN staff—from peacekeepers to humanitarian workers to human rights monitors—who risk their lives daily to protect civilians in harm's way. We must never take them for granted or underestimate the challenges they face in defense of our shared values and international peace and security.

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(4) Private military security companies, military contractors, and their accountability

On November 17, 2011, John F. Sammis, U.S. Deputy Representative to ECOSOC, provided an explanation of the U.S. "no" vote on a draft Third Committee resolution, "Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination." U.N. Doc. A/C.3/66/L.62. Mr. Sammis repeated the United States' opposition to a new legally binding instrument in favor of more effective implementation of existing laws relating to private military and security companies and through other collaborative inter-governmental efforts with industry and civil society. His remarks, set forth below, are available at <http://usun.state.gov/briefing/statements/2011/177341.htm>. See *Digest 2010* at 738-42 regarding prior developments in this area.

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The United States takes very seriously issues regarding private security companies, military contractors and their accountability. The United States continues to believe that the most effective and immediate way of addressing these concerns is through better implementation of existing laws—both national and international—and through robust collaborative efforts that bring together industry, civil society and governments to work directly on raising standards, such as the Montreux Document** and the International Code of Conduct for Private Security Service Providers.***

* Editor's note: See Chapter 17.C.1. for discussion of President Obama's Directive on Mass Atrocities.

** Editor's note: The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies was produced on September 17, 2008 at the initiative of the Swiss government and the International Committee of the Red Cross.

*** Editor's note: The International Code of Conduct for Private Security Service Providers was signed November 9, 2010 in Geneva. See *Digest 2010* at 740-42.

We were pleased to participate in the May inter-governmental working group in Geneva, and were encouraged by the wide range of useful discussions that took place. At that meeting, several delegations and experts expressed the view that the inter-governmental working group should consider alternatives to elaborating a convention. Following those discussions, we believe there is the potential to proceed in another direction—perhaps by providing guidance to countries considering ways to regulate more effectively.

Unfortunately, the resolution before us prejudices the ongoing work of the intergovernmental working group, strays from the original mandate to “consider the possibility” of elaborating an international regulatory framework, and rushes to support a poorly considered, legally binding instrument where additional law is not needed at this time.

Additionally, in attempting to build on the problematic draft convention proposed by the Working Group on Mercenaries, this resolution would create a time-consuming, resource-intensive process that is not likely to produce practical results. The Working Group’s draft convention is unworkable and inappropriately broad. For example, as currently drafted, it would likely prohibit military and police training programs provided by private companies, making it difficult for many countries to obtain necessary training services. It could also impact UN humanitarian and peacekeeping efforts, many of which rely on private contractors for logistics, security, and training. It would even reach broad categories of conduct not appropriately regulated in such a convention, including information security or material support to militaries.

At a minimum, devoting resources to drafting a formal convention is premature, in light of still-evolving domestic and international efforts, such as the Montreux Document and the Code of Conduct. We believe that we should allow these efforts to mature so as to further distill key insights and best practices before a decision on formal drafting of a convention is warranted. For all of these reasons, the United States regrets that we must call a vote and vote no on this resolution.

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2. Convention on Certain Conventional Weapons: Negotiation of CCW Protocol on Cluster Munitions

During 2011, the United States continued efforts to negotiate a new protocol to the Convention on Certain Conventional Weapons (“CCW”) to address the humanitarian harm that cluster munitions can cause. In conjunction with the Conference of States Parties in November 2011, Mr. Koh held a special briefing via teleconference to explain the United States position on the new draft protocol and urge its conclusion notwithstanding the existing Convention on Cluster Munitions (“Oslo Convention”). Excerpts from that briefing appear below. The full transcript is available at www.state.gov/s/l/releases/remarks/177280.htm. See Digest 2010 at 742-45, Digest 2009 at 701-6, Digest 2008 at 885-88, and Digest 2007 at 899-905 for background on the United States position in prior negotiations. The Conference concluded without adopting the draft protocol.

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...The question here is whether we should support a sixth protocol, which is under discussion, about cluster munitions. And our position is that we should, based on the chair's text that's currently before the conference.

We wanted to dispel at the outset the notion that in some way we are trying to detract from the Oslo Convention, which is a separate treaty outside the framework of the CCW, which also addresses clusters. We see the two as complementary, not as competitive. Nothing that we are saying or supporting would diminish or detract from the Oslo Convention, and we think that the protocol that's under consideration here takes a significant step toward a goal that everybody shares, which is to address comprehensively the humanitarian impact of cluster munitions.

Just to make this concrete, many countries in the world are not parties to Oslo and are unlikely to become so, and that they represent 85 to 90 percent of the world's cluster munition stockpiles. So a question then becomes: How do you regulate that 85 to 90 percent holders if they're never going to join the Oslo Convention? And the obvious answer is to try to bring regulation into the CCW, where they do participate.

Under discussion right now is a ban on cluster munitions that are produced before 1980. If that were adopted as part of this protocol upon ratification and entry into force, it would immediately prohibit over 2 million cluster munitions or more than 100 million submunitions, which is about one-third of the entire U.S. stockpile of cluster munitions. To put it directly, if this rule is adopted, it would prohibit more cluster munitions for the United States alone, than the Oslo Convention has prohibited for all of its member states combined. And we think that this is a very significant humanitarian impact and should be supported. It's true for other countries as well. For example, Ukraine announced that if this rule were adopted, it would prohibit more than a third of their existing stocks, almost 700,000 tons. Millions of the Russians' munitions would be banned as well. So, we think that this protocol would have an immediate and tangible humanitarian effect.

The two other advantages of adopting this protocol are that it would create a detailed set of rules about clusters, including obligations with regard to transparency, cooperation, clearance, assistance to victims, and technological assistance. And a third advantage is that the draft protocol is designed to evolve and grow stronger. There are a very detailed set of technical annexes that would adapt to technical developments that might occur with regard to these kinds of munitions, and as well as commitments to review the annexes and to get more comprehensive provisions over time.

So, we think that it is clearly complementary to the norms that are out there. The United States is deeply committed to conventional weapons destruction. We've provided more than \$1.9 billion toward that goal since 1993 in some 81 countries, and we think that this is a step in the same direction. We obviously want to address humanitarian considerations while also addressing military concerns, But that is the posture in which we are approaching this conference which is going on now in Geneva.

* * * *

...[M]any of the countries who ... participate in the CCW will never becomes party to Oslo. If this protocol comes into force and binding for them, three things happen immediately. They have to destroy pre-1980 clusters; they enter a framework of regulation where they have to report on their stocks—the level of international cooperation and victim assistance—and third,

the protocol develops over time to adapt to technological developments which could otherwise be used to avoid rules.

So for that group of nations who are in the CCW who are otherwise subject to no rules, this brings them within a regime of regulation. It does nothing to hurt Oslo, in our view, and the two therefore are complementary. It expands the impact of the regime that we're all trying to create here.

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3. Detainees

a. Overview

(1) *White House fact sheet*

On March 7, 2011, the White House released a fact sheet regarding its detainee policy and new actions taken to close the detention facility at Guantanamo Bay, Cuba. The fact sheet is available at www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. See also March 7, 2011 statement by Defense Secretary Robert Gates, available at www.defense.gov/releases/release.aspx?releaseid=14316 and March 7, 2011 statement of Attorney General Eric Holder, available at www.mainjustice.com/2011/03/07/statement-of-attorney-general-eric-holder-on-guantanamo-bay-and-detainee-policy/. The White House fact sheet referenced President Obama's May 21, 2009 speech at the National Archives regarding the approach to closing Guantanamo. See *Digest 2009* at 709-16. Excerpts from the fact sheet follow.

* * * *

The Administration remains committed to closing the detention facility at Guantanamo Bay, and to maintain[ing] a lawful, sustainable and principled regime for the handling of detainees there, consistent with the full range of U.S. national security interests. In keeping with the strategy we laid out, we are proceeding today with the following actions:

Resumption of Military Commissions^{****}

The Secretary of Defense will issue an order rescinding his prior suspension on the swearing and referring of new charges in the military commissions. New charges in military commissions have been suspended since the President announced his review of detainee policy, shortly after taking office.

The Administration ... has successfully enacted key reforms, such as a ban on the use of statements taken as a result of cruel, inhuman or degrading treatment, and a better system for handling classified information. With these and other reforms, military commissions, along with prosecutions of suspected terrorists in civilian courts, are an available and important tool in

**** Editor's note: See section 3.d. below for further discussion of military commissions proceedings in 2011.

combating international terrorists that fall within their jurisdiction while upholding the rule of law.

Executive Order on Periodic Review*****

In the Archives speech, the President recognized there are certain Guantanamo detainees who have not been charged, convicted, or designated for transfer, but must continue to be detained because they “in effect, remain at war with the United States.” For this category of detainees, the President stated: “We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.”

Today, the President issued an Executive Order establishing such a process for these detainees. ...

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Continued Commitment to Article III Trials

Pursuant to the President’s order to close Guantanamo, this Administration instituted the most thorough review process ever applied to the detainees held there. Among other things, for the first time, we consolidated all information available to the federal government about these individuals. That information was carefully examined by some of our government’s most experienced prosecutors, a process that resulted in the referral of 36 individuals for potential prosecution. Since the time of those referrals, the Departments of Justice and Defense, with the advice of career military and civilian prosecutors, have been working to bring these defendants to justice, securing convictions in a number of cases and evaluating others to determine which system—military or civilian—is most appropriate based on the nature of the evidence and traditional principles of prosecution.

* * * *

Time and again, our Federal courts have delivered swift justice and severe punishment to those who seek to attack us. In the last two years alone, federal prosecutors have convicted numerous defendants charged with terrorism offenses, including those who plotted to bomb the New York subway system; attempted to detonate a bomb in Times Square; and conspired in murderous attacks on our embassies abroad. These prosecutions have generated invaluable intelligence about our enemies, permitted us to incapacitate and detain dangerous terrorists, and vindicated the interests of victims—all while reaffirming our commitment to the rule of law. Spanning multiple administrations, Republican and Democratic, our Federal courts have proven to be one of our most effective counterterrorism tools, and should not be restricted in any circumstances.

Military commissions should proceed in cases where it has been determined appropriate to do so. Because there are situations, however, in which our federal courts are a more appropriate forum for trying particular individuals, we will seek repeal of the restrictions imposed by Congress, so that we can move forward in the forum that is, in our judgment, most in line with our national security interests and the interests of justice.

Editor’s note: See 3.b. below for further discussion of the executive order on periodic review.

We will continue to vigorously defend the authority of the Executive to make these well-informed prosecution decisions, both with respect to those detainees in our custody at Guantanamo and those we may apprehend in the future. A one-size-fits-all policy for the prosecution of suspected terrorists, whether for past or future cases, undermines our Nation's counterterrorism efforts and harms our national security.

Support for a Strong International Legal Framework

Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions. Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An extensive interagency review concluded that United States military practice is already consistent with the Protocol's provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

* * * *

(2) Detention policies guided by rule of law

In his remarks at Harvard Law School, discussed in A.1.a.(2)(ii) *supra*, Assistant to the President John O. Brennan discussed how the rule of law has guided the Obama administration's policies on detention, interrogation, and prosecution of suspected participants in al-Qaida's campaign against the United States. Mr. Brennan's remarks on that issue appear below; the full text of his remarks is available at www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

* * * *

Detention and interrogation

We've worked to uphold our values and the rule of law in a[nother] area—the question of how to deal with terrorist suspects, including the significant challenge of how to handle suspected terrorists who were already in our custody when this Administration took office. There are few places where the intersection of our counterterrorism efforts, our laws, and our values come together as starkly as it does at the prison at Guantánamo. By the time President Obama took office, Guantánamo was viewed internationally as a symbol of a counterterrorism approach that flouted our laws and strayed from our values, undercutting the perceived legitimacy—and therefore the effectiveness—of our efforts.

Aside from the false promises of enhanced security, the purported legality of depriving detainees of their rights was soundly and repeatedly rejected by our courts. It came as no surprise, then, that before 2009 few counterterrorism proposals generated as much bipartisan support as those to close Guantánamo. It was widely recognized that the costs associated with Guantánamo ran high, and the promised benefits never materialized.

That was why...on one of his first days in office, President Obama issued the executive order to close the prison at Guantánamo. Yet, almost immediately, political support for closure waned. Over the last two years Congress has placed unprecedented restrictions on the discretion of our experienced counterterrorism professionals to prosecute and transfer individuals held at the prison. These restrictions prevent these professionals—who have carefully studied all of the available information in a particular situation—from exercising their best judgment as to what the most appropriate disposition is for each individual held there.

The Obama Administration has made its views on this clear. The prison at Guantánamo Bay undermines our national security, and our nation will be more secure the day when that prison is finally and responsibly closed. For all of the reasons mentioned above, we will not send more individuals to the prison at Guantánamo. And we continue to urge Congress to repeal these restrictions and allow our experienced counterterrorism professionals to have the flexibility they need to make individualized, informed decisions about where to bring terrorists to justice and when and where to transfer those whom it is no longer in our interest to detain.

This Administration also undertook an unprecedented review of our detention and interrogation practices and their evolution since 2001, and we have confronted squarely the question of how we will deal with those we arrest or capture in the future, including those we take custody of overseas. Nevertheless, some have suggested that we do not have a detention policy; that we prefer to kill suspected terrorists, rather than capture them. This is absurd, and I want to take this opportunity to set the record straight.

As a former career intelligence professional, I have a profound appreciation for the value of intelligence. Intelligence disrupts terrorist plots and thwarts attacks. Intelligence saves lives. And one of our greatest sources of intelligence about al-Qa'ida, its plans, and its intentions has been the members of its network who have been taken into custody by the United States and our partners overseas.

So I want to be very clear—whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration.

Some have argued that the United States should simply hold suspected terrorists in law of war detention indefinitely. It is worth remembering, however, that, for a variety of reasons, reliance upon military detention for individuals apprehended outside of Afghanistan and Iraq actually began to decline precipitously years *before* the Obama Administration came into office.

In the years following the 9/11 attacks, our knowledge of the al-Qa'ida network increased and our tools with which to bring them to justice in federal courts or reformed military commissions were strengthened, thus reducing the need for long-term law of war detention. In fact, from 2006 to the end of 2008, when the previous administration apprehended terrorists overseas and outside of Iraq and Afghanistan, it brought more of those individuals to the United States to be prosecuted in our federal courts than it placed in long-term military detention at Guantánamo.

Article III courts & reformed military commissions

When we succeed in capturing suspected terrorists who pose a threat to the American people, our other critical national security objective is to maintain a viable authority to keep those individuals behind bars. The strong preference of this Administration is to accomplish that through prosecution, either in an Article III court or a reformed military commission. Our decisions on which system to use in a given case must be guided by the factual and legal complexities of each case, and relative strengths and weaknesses of each system. Otherwise, terrorists could be set free, intelligence lost, and lives put at risk.

That said, it is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it.

This is not a radical idea, nor is the idea of prosecuting terrorists captured overseas in our Article III courts. Indeed, terrorists captured beyond our borders have been successfully prosecuted in our federal courts on many occasions. Our federal courts are time-tested, have unquestioned legitimacy, and, at least for the foreseeable future, are capable of producing a more predictable and sustainable result than military commissions. The previous administration, successfully prosecuted hundreds of suspected terrorists in our federal courts, gathering valuable intelligence from several of them that helped our counterterrorism professionals protect the American people. In fact, every single suspected terrorist taken into custody on American soil—before and after the September 11th attacks—has first been taken into custody by law enforcement.

In the past two years alone, we have successfully interrogated several terrorism suspects who were taken into law enforcement custody and prosecuted, including Faisal Shahzad, Najibullah Zazi, David Headley, and many others. In fact, faced with the firm but fair hand of the American justice system, some of the most hardened terrorists have agreed to cooperate with the FBI, providing valuable information about al-Qa'ida's network, safe houses, recruitment methods, and even their plots and plans. That is the outcome that all Americans should not only want, but demand from their government.

Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system. There is bipartisan agreement that U.S. citizens should not be tried by military commission. Since 2001, two U.S. citizens were held in military custody, and after years of controversy and extensive litigation, one was released; the other was prosecuted in federal court. Even as the

number of U.S. citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are more than up to the job.

In short, our Article III courts are not only our single most effective tool for prosecuting, convicting, and sentencing suspected terrorists—they are a proven tool for gathering intelligence and preventing attacks. For these reasons, credible experts from across the political spectrum continue to demand that our Article III courts remain an unrestrained tool in our counterterrorism toolbox. And where our counterterrorism professionals believe prosecution in our federal courts would best protect the full range of U.S. security interests and the safety of the American people, we will not hesitate to use them. The alternative—a wholesale refusal to utilize our federal courts—would undermine our values and our security.

At the same time, reformed military commissions also have their place in our counterterrorism arsenal. Because of bipartisan efforts to ensure that military commissions provide all of the core protections that are necessary to ensure a fair trial, we have restored the credibility of that system and brought it into line with our principles and our values. Where our counterterrorism professionals believe trying a suspected terrorist in our reformed military commissions would best protect the full range of U.S. security interests and the safety of the American people, we will not hesitate to utilize them to try such individuals. In other words, rather than a rigid reliance on just one or the other, we will use both our federal courts and reformed military commissions as options for incapacitating terrorists.

As a result of recent reforms, there are indeed many similarities between the two systems, and at times, these reformed military commissions offer certain advantages. But important differences remain—differences that can determine whether a prosecution is more likely to succeed or fail.

For example, after Ahmed Warsame—a member of al-Shabaab with close ties to al-Qa’ida in the Arabian Peninsula—was captured this year by U.S. military personnel, the President’s national security team unanimously agreed that the best option for prosecuting him was our federal courts, where, among other advantages, we could avoid significant risks associated with, and pursue additional charges not available in, a military commission. And, if convicted of certain charges, he faces a mandatory life sentence.

In choosing between our federal courts and military commissions in any given case, this Administration will remain focused on one thing—the most effective way to keep that terrorist behind bars. The only way to do that is to let our experienced counterterrorism professionals determine, based on the facts and circumstances of each case, which system will best serve our national security interests.

In the end, the Obama Administration’s approach to detention, interrogation and trial is simple. We have established a practical, flexible, results-driven approach that maximizes our intelligence collection and preserves our ability to prosecute dangerous individuals. Anything less—particularly a rigid, inflexible approach—would be disastrous. It would tie the hands of our counterterrorism professionals by eliminating tools and authorities that have been absolutely essential to their success.

* * * *

(3) Presidential signing statements on defense authorization act provisions

On several occasions in 2011, President Obama issued signing statements on defense authorization and appropriation acts passed by Congress in which he stated his opposition to those acts' provisions relating to detainees. Daily Comp. Pres. Docs. 2011 DCPD No. 00010; Daily Comp. Pres. Docs. 2011 DCPD No. 00263; Daily Comp. Pres. Docs. 2011 DCPD No. 00978. Excerpts below from the President's December 31, 2011 signing statement for the National Defense Authorization Act for Fiscal Year 2012 reiterate opposition to those provisions and set forth the administration's plans for interpreting them.

* * * *

The fact that I support this bill as a whole does not mean I agree with everything in it. In particular, I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists. ...

... Ultimately, I decided to sign this bill not only because of the critically important services it provides for our forces and their families and the national security programs it authorizes, but also because the Congress revised provisions that otherwise would have jeopardized the safety, security, and liberty of the American people. Moving forward, my Administration will interpret and implement the provisions described below in a manner that best preserves the flexibility on which our safety depends and upholds the values on which this country was founded.

* * * *

Section 1022 seeks to require military custody for a narrow category of non-citizen detainees who are "captured in the course of hostilities authorized by the Authorization for Use of Military Force." This section is ill-conceived and will do nothing to improve the security of the United States. The executive branch already has the authority to detain in military custody those members of al-Qa'ida who are captured in the course of hostilities authorized by the AUMF, and as Commander in Chief I have directed the military to do so where appropriate. I reject any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat. While section 1022 is unnecessary and has the potential to create uncertainty, I have signed the bill because I believe that this section can be interpreted and applied in a manner that avoids undue harm to our current operations.

... I will therefore interpret and implement section 1022 in the manner that best preserves the same flexible approach that has served us so well for the past 3 years and that protects the ability of law enforcement professionals to obtain the evidence and cooperation they need to protect the Nation.

* * * *

Sections 1023–1025 needlessly interfere with the executive branch's processes for reviewing the status of detainees. Going forward, consistent with congressional intent as detailed in the Conference Report, my Administration will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section.

Sections 1026–1028 continue unwise funding restrictions that curtail options available to the executive branch. Section 1027 renews the bar against using appropriated funds for fiscal year 2012 to transfer Guantanamo detainees into the United States for any purpose. I continue to oppose this provision, which intrudes upon critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts to protect the Nation. Removing that tool from the executive branch does not serve our national security. Moreover, this intrusion would, under certain circumstances, violate constitutional separation of powers principles.

Section 1028 modifies but fundamentally maintains unwarranted restrictions on the executive branch's authority to transfer detainees to a foreign country. This hinders the executive's ability to carry out its military, national security, and foreign relations activities and like section 1027, would, under certain circumstances, violate constitutional separation of powers principles. The executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. In the event that the statutory restrictions in sections 1027 and 1028 operate in a manner that violates constitutional separation of powers principles, my Administration will interpret them to avoid the constitutional conflict.

Section 1029 requires that the Attorney General consult with the Director of National Intelligence and Secretary of Defense prior to filing criminal charges against or seeking an indictment of certain individuals. I sign this based on the understanding that apart from detainees held by the military outside of the United States under the 2001 Authorization for Use of Military Force, the provision applies only to those individuals who have been determined to be covered persons under section 1022 before the Justice Department files charges or seeks an indictment. Notwithstanding that limitation, this provision represents an intrusion into the functions and prerogatives of the Department of Justice and offends the longstanding legal tradition that decisions regarding criminal prosecutions should be vested with the Attorney General free from outside interference. Moreover, section 1029 could impede flexibility and hinder exigent operational judgments in a manner that damages our security. My Administration will interpret and implement section 1029 in a manner that preserves the operational flexibility of our counterterrorism and law enforcement professionals, limits delays in the investigative process, ensures that critical executive branch functions are not inhibited, and preserves the integrity and independence of the Department of Justice.

* * * *

b. Periodic review for Guantanamo detainees: Executive Order 13567

On March 7, 2011, President Obama issued Executive Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force." 76 Fed. Reg. 13,277 (Mar. 10, 2011). As explained in Section 1 of the order, the periodic review process was intended to follow up on the interagency review of detainees established by Executive Order 13492 of January 22, 2009 (see *Digest 2009* at 719-22) and, in particular, was directed at those for whom review pursuant to Executive Order 13492 resulted in a determination that continued detention was warranted. Section 2

of the order established that continued detention is warranted “when necessary to protect against a significant threat to the security of the United States.” Section 4 of the order further provided that if a final determination is made that a detainee no longer constitutes a significant threat to U.S. security, the secretaries of State and Defense will identify a suitable transfer location outside the United States, consistent with the national security and foreign policy interests of the United States and applicable law. See March 7, 2011 White House fact sheet, available at www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-quant-namo-and-detainee-policy.

Section 3 of the order, which is set forth below, outlines the periodic review process.

* * * *

Sec. 3. *Periodic Review.* The Secretary of Defense shall coordinate a process of periodic review of continued law of war detention for each detainee described in section 1(a) of this order. In consultation with the Attorney General, the Secretary of Defense shall issue implementing guidelines governing the process, consistent with the following requirements:

(a) *Initial Review.* For each detainee, an initial review shall commence as soon as possible but no later than 1 year from the date of this order. The initial review will consist of a hearing before a Periodic Review Board (PRB). The review and hearing shall follow a process that includes the following requirements:

(1) Each detainee shall be provided, in writing and in a language the detainee understands, with advance notice of the PRB review and an unclassified summary of the factors and information the PRB will consider in evaluating whether the detainee meets the standard set forth in section 2 of this order. The written summary shall be sufficiently comprehensive to provide adequate notice to the detainee of the reasons for continued detention.

(2) The detainee shall be assisted in proceedings before the PRB by a Government-provided personal representative (representative) who possesses the security clearances necessary for access to the information described in subsection (a)(4) of this section. The representative shall advocate on behalf of the detainee before the PRB and shall be responsible for challenging the Government’s information and introducing information on behalf of the detainee. In addition to the representative, the detainee may be assisted in proceedings before the PRB by private counsel, at no expense to the Government.

(3) The detainee shall be permitted to (i) present to the PRB a written or oral statement; (ii) introduce relevant information, including written declarations; (iii) answer any questions posed by the PRB; and (iv) call witnesses who are reasonably available and willing to provide information that is relevant and material to the standard set forth in section 2 of this order.

(4) The Secretary of Defense, in coordination with other relevant Government agencies, shall compile and provide to the PRB all information in the detainee disposition recommendations produced by the Task Force established under Executive Order 13492 that is relevant to the determination whether the standard in section 2 of this order has been met and on which the Government seeks to rely for that determination. In addition, the Secretary of Defense, in coordination with other relevant Government agencies, shall

compile any additional information relevant to that determination, and on which the Government seeks to rely for that determination, that has become available since the conclusion of the Executive Order 13492 review. All mitigating information relevant to that determination must be provided to the PRB.

(5) The information provided in subsection (a)(4) of this section shall be provided to the detainee's representative. In exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods, the PRB may determine that the representative must receive a sufficient substitute or summary, rather than the underlying information. If the detainee is represented by private counsel, the information provided in subsection (a)(4) of this section shall be provided to such counsel unless the Government determines that the need to protect national security, including intelligence sources and methods, or law enforcement or privilege concerns, requires the Government to provide counsel with a sufficient substitute or summary of the information. A sufficient substitute or summary must provide a meaningful opportunity to assist the detainee during the review process.

(6) The PRB shall conduct a hearing to consider the information described in subsection (a)(4) of this section, and other relevant information provided by the detainee or the detainee's representative or counsel, to determine whether the standard in section 2 of this order is met. The PRB shall consider the reliability of any information provided to it in making its determination.

(7) The PRB shall make a prompt determination, by consensus and in writing, as to whether the detainee's continued detention is warranted under the standard in section 2 of this order. If the PRB determines that the standard is not met, the PRB shall also recommend any conditions that relate to the detainee's transfer. The PRB shall provide a written summary of any final determination in unclassified form to the detainee, in a language the detainee understands, within 30 days of the determination when practicable.

(8) The Secretary of Defense shall establish a secretariat to administer the PRB review and hearing process. The Director of National Intelligence shall assist in preparing the unclassified notice and the substitutes or summaries described above. Other executive departments and agencies shall assist in the process of providing the PRB with information required for the review processes detailed in this order.

(b) *Subsequent Full Review.* The continued detention of each detainee shall be subject to subsequent full reviews and hearings by the PRB on a triennial basis. Each subsequent review shall employ the procedures set forth in section 3(a) of this order.

(c) *File Reviews.* The continued detention of each detainee shall also be subject to a file review every 6 months in the intervening years between full reviews. This file review will be conducted by the PRB and shall consist of a review of any relevant new information related to the detainee compiled by the Secretary of Defense, in coordination with other relevant agencies, since the last review and, as appropriate, information considered during any prior PRB review. The detainee shall be permitted to make a written submission in connection with each file review. If, during the file review, a significant question is raised as to whether the detainee's continued detention is warranted under the standard in section 2 of this order, the PRB will promptly convene a full review pursuant to the standards in section 3(a) of this order.

(d) *Review of PRB Determinations.* The Review Committee (Committee), as defined in section 9(d) of this order, shall conduct a review if (i) a member of the Committee seeks review

of a PRB determination within 30 days of that determination; or (ii) consensus within the PRB cannot be reached.

* * * *

c. U.S. court decisions and proceedings

(1) Detainees at Guantanamo: Habeas litigation

(i) Overview

In 2011, habeas litigation relating to the Defense Department's detention of individuals at Guantanamo Bay continued before the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. See *Digest 2010* at 753-61 and *Digest 2009* at 732-50 for coverage of prior developments in habeas litigation. Some of the D.C. Circuit's decisions, reflecting noteworthy developments in its considerations of the President's detention authority, are discussed in this section.

(ii) *Al-Madhwani v. Obama*

On May 27, 2011, the D.C. Circuit affirmed a lower court's denial of a petition for a writ of habeas corpus brought by a Yemeni national detained at Guantanamo. *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011). In articulating the scope of the United States' detention authority, the court relied on several of its own precedents, including *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 1814 (2011); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010). See *Digest 2010* at 754-61. The court reiterated that the detention authority conferred by the AUMF covers at least those who are part of al-Qaida and that a functional approach should be used to determine relation to the organization and affirmed the district court's denial of habeas relief. The court concluded that Madhwani's activities, including residence in an al-Qaida guesthouse and military-style training camp, carrying an al-Qaida-issued weapon, and capture in the company of al-Qaida operatives, showed he was part of al-Qaida by a preponderance of the evidence. The petitioner filed a petition for a writ of certiorari in the U.S. Supreme Court on October 24, 2011.*

(iii) *Almerfedi v. Obama*

* Editor's note: The United States filed its response to the petition for certiorari on January 26, 2012. *Digest 2012* will discuss further developments in the case.

On June 10, 2011, the D.C. Circuit reversed a lower court's grant of the writ of habeas corpus to a Yemeni national detained at Guantanamo. *Almerfed v. Obama*, 654 F.3d 1 (D.C. Cir. 2011). The court explained that the preponderance of the evidence standard does not equate with the higher "beyond a reasonable doubt" standard applied in criminal cases. *Id.* at 5. The court found that correctly using the preponderance of the evidence standard in Almerfed's case required denying habeas relief. *Id.* at 6. Almerfed had not rebutted the evidence with more persuasive evidence that he did not meet the criteria for detention, according to the court. *Id.* at 7. Almerfed filed a petition for a writ of certiorari in the U.S. Supreme Court on November 7, 2011.**

(iv) *Latif v. Obama*

On October 14, 2011, the D.C. Circuit in a 2-1 decision reversed a lower court's grant of the writ of habeas corpus to a Yemeni national and remanded for further consideration. *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), 2012 WL 1494924. The majority opinion held that official government intelligence reports should be granted a presumption of regularity. As the majority explained, the presumption of regularity "presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source's statement." *Id.* at 750. It went on to find that Latif had not met the burden of rebutting the presumption. *Id.* at 755-56. The majority opinion also held that the lower court failed to make a credibility finding when it credited Latif's declaration in discrediting the key government report that supported his detention, *id.* at 756, and that it took an "unduly atomized approach" to the evidence in contravention of Circuit precedent, *id.* at 759.

Judge Tatel dissented, arguing that the court should not apply a presumption of regularity to government reports "produced in the fog of war by a clandestine method that we know almost nothing about." *Id.* at 772. He also argued that the majority opinion inappropriately substituted its own fact-finding for the district court's.***

(2) *Freedom of Information Act Case: American Civil Liberties Union v. Department of Defense*

On January 18, 2011, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *American Civil Liberties Union v. Department of Defense* affirming the lower court's grant of summary judgment for the U.S. government. 628 F.3d 612 (D.C. Cir. 2011). The American Civil Liberties Union ("ACLU") brought an action against the Department of Defense ("DOD") and the Central Intelligence Agency ("CIA") (collectively, the U.S. government) pursuant to the Freedom of Information Act ("FOIA"), seeking

** Editor's note: The United States filed its response to the petition for certiorari on April 4, 2012. *Digest 2012* will discuss further developments in the case.

*** Editor's note: Petitioner filed a petition for a writ of certiorari on January 12, 2012. *Digest 2012* will discuss further developments in the case.

information withheld from its FOIA production that related to the capture, detention, and interrogation of fourteen “high value” detainees originally held outside the U.S. and then transferred to Guantanamo. *Id.* at 617.

The district court granted the U.S. government’s motion for summary judgment, finding that the information sought was properly withheld under two exemptions from disclosure under FOIA: exemption 1 covering records properly classified pursuant to executive order; and exemption 3 covering records exempted from disclosure by statute. *Id.* at 618. The ACLU appealed, but in 2009, before the appeal was decided, President Obama took several steps relating to interrogation techniques, detention at Guantanamo, and treatment of suspected terrorists. *Id.* at 618; see also *Digest 2009* at 716-22 (discussing Executive Orders 13491 and 13492). Also in 2009, the U.S. government declassified Department of Justice Office of Legal Counsel memoranda pertaining to interrogation techniques and released a declassified version of a CIA report on interrogation techniques. In addition, a report by the International Committee of the Red Cross pertaining to the treatment of the fourteen “high value” detainees was leaked to the press and published.

The D.C. Circuit remanded in light of these developments and the U.S. government voluntarily modified its FOIA production by releasing one previously redacted record in its entirety and revising its redactions to other documents. 628 F.3d at 618. The lower court again granted summary judgment for the government and the ACLU again appealed, making four main arguments challenging the government’s authority to withhold the information.

First, the ACLU claimed the withheld information had already been declassified and was publicly available. The court agreed with the government that “there are substantive differences between the disclosed documents and the information that has been withheld.” *Id.* at 621. In addition, the court held that the Red Cross report leaked to the press did not constitute an official government disclosure and therefore was irrelevant to the government’s authority to withhold records. *Id.* at 621-22.

Second, the ACLU contended that the government could not properly withhold documents relating to interrogation techniques that were subsequently prohibited by the President. The court found “no legal support for the conclusion that illegal activities cannot produce classified documents.” *Id.* at 622.

Third, the ACLU asserted that the government could not withhold information derived from the detainees’ own experiences and observations while continuing to detain them and thereby preventing them from making those statements public themselves. The court rejected this argument as “irrelevant to the reality that the information that the CIA wishes to withhold is within the government’s control.” *Id.* at 623. It reasoned further that “Even if the detainees were to be released, erstwhile detainees might embellish or outright lie about their experiences, illustrating the government’s continuing interest in keeping its own records secret.” *Id.*

Fourth, the ACLU argued that the withheld information had been so widely disseminated that its disclosure could no longer do any harm to national security interests. This argument too failed because the court accorded due deference to the CIA’s assessment, which identified five reasons that disclosure might harm national security, only one of which had been specifically challenged by the ACLU. The court concluded that “it is

both plausible and logical that the disclosure of information regarding the capture, detention, and interrogation of detainees would degrade the CIA's ability to carry out its mission." *Id.* at 624. In addition, the court reiterated that information must be officially acknowledged, not just disseminated by any means, for its disclosure to be required. "[W]e have repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject." *Id.* at 625.

The court also rejected the ACLU's challenge to the lower court's decision not to conduct an in camera review of the information withheld. The appeals court agreed with the lower court that the government's affidavit was sufficiently detailed and specific that such a review was not necessary to find that the exemptions to disclosure under FOIA were properly invoked.

(3) *Former detainees: civil suits against U.S. officials*

(i) ***Ali v. Rumsfeld***

On June 21, 2011, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court's dismissal of a case brought by Iraqi and Afghan citizens detained in Iraq and Afghanistan against the former Secretary of Defense and several high-ranking army officers. *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011). The D.C. Circuit applied its prior decisions in *Rasul* to dismiss claims brought under the Constitution, the Alien Tort Statute ("ATS"), and the Geneva Conventions. *Rasul v. Myers* ("*Rasul I*"), 512 F.3d 644 (D.C. Cir. 2008); *Rasul v. Myers* ("*Rasul II*"), 563 F.3d 527 (D.C. Cir. 2009). See *Digest 2009* at 751-52. The court held that the government officials were protected by qualified immunity because it was not clearly established at the time that rights under the U.S. Constitution applied to aliens held in Iraq and Afghanistan. 649 F.3d at 771. The court also found an alternative basis for dismissal, as it had in *Rasul II*, namely, that allowing an action for damages to proceed "against American military officials engaged in war would disrupt and hinder the ability of our armed forces 'to act decisively and without hesitation in defense of our liberty and national interests.'" (quoting the lower court's decision).

As to the ATS claim for violation of the Geneva Conventions, the court applied the reasoning in *Rasul II* to find that the alleged conduct occurred in the scope of the defendants' employment and therefore should be properly restyled as claims against the United States under the Federal Tort Claims Act ("FTCA"). *Id.* at 774. Since plaintiffs failed to pursue any administrative remedies as required by the FTCA prior to bringing suit, their ATS claims were properly dismissed.

The court also dismissed the claims for declaratory relief based on its determination that none of the causes of action stated were cognizable. *Id.* at 778.

(ii) *Lebron v. Rumsfeld*

On July 18, 2011, the United States filed a brief as amicus curiae in the U.S. Court of Appeals for the Fourth Circuit in *Lebron v. Rumsfeld*. No. 11-6480, 2011 WL 2790757. The U.S. brief argued that the Court of Appeals should affirm the district court's decision dismissing the claims against current and former U.S. government officials. The claims were brought by Jose Padilla, an American citizen, and his mother (Lebron), alleging that Padilla's detention as an "enemy combatant" violated federal statutory and constitutional rights. For background on Padilla and previous challenges to his detention, see *Digest 2002* at 998-1000; *Digest 2003* at 1028-29; and *Digest 2005* at 1018. Plaintiffs brought their claims (1) pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents* and its progeny, which allow the judiciary to imply a cause of action against federal officials for constitutional violations in certain circumstances, and (2) pursuant to the Religious Freedom Restoration Act. The U.S. brief argued that a *Bivens* action should not be recognized in the context of this case, in light of its national security and war powers implications and the fact that Congress had created other mechanisms to prevent detainee mistreatment and challenge military detention. The U.S. brief also asserted that, even if a *Bivens* action were recognized, qualified immunity shielded the defendants. Excerpts follow from the U.S. brief (with footnotes and citations to the record omitted). ****

* * * *

This appeal presents a dispositive threshold issue, which supports dismissal of all of the claims asserted by plaintiffs under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As the district court held, "'special factors' are present in this case which counsel hesitation in creating a right of action ... in the absence of express Congressional authorization." Those factors "include the potential impact of a *Bivens* claim on the Nation's military affairs, foreign affairs, intelligence, and national security" given that the decision to detain Padilla was "made in light of the most profound and sensitive issues of national security, foreign affairs and military affairs." As the court explained, creating a cause of action would "by necessity entangle[] the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence"; it would launch "a massive discovery assault in the intelligence agencies" and it "could 'raise numerous complicated state secret issues.'" Additionally, creating a *Bivens* remedy is particularly inappropriate in this context given that "Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for... money damages."

* * * *

Here, where Padilla's damage claims directly relate, inter alia, to the President's war powers, including whether and when a person captured in this country during an armed conflict can be held in military detention under the laws of war, it would be particularly inappropriate for

**** Editor's note: On January 23, 2012, the Court of Appeals for the Fourth Circuit issued its opinion affirming the district court's dismissal of all claims. 670 F.3d 540 (4th Cir. 2012).

this Court to unnecessarily reach the merits of the constitutional claims. As Justice Kennedy noted in the Supreme Court's denial of review of the Fourth Circuit's ruling after Padilla was transferred to civilian criminal custody, "[t]hat Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against [unnecessarily] addressing those claims." *Padilla v. Hanft*, 126 S.Ct. 1649, 1650 (2006) (Kennedy, J., concurring). That advice applies equally to Padilla's claims here.

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009). In creating a common law action under the Fourth Amendment against federal officials for conducting a warrantless search for drugs, the Court reasoned that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Subsequent to *Bivens*, the Supreme Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). ...

* * * *

Here, there are multiple special factors counseling against recognition of a *Bivens* claim, and those factors, "[t]aken together," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), counsel strongly against creating a *Bivens* remedy.

A. A *Bivens* Remedy Should Not Be Created Because This Case Directly Implicates National Security and War Powers

The national security and war powers context presented by the claims here clearly counsels against the recognition of a *Bivens* action.

Even outside the *Bivens* context, the courts have recognized that "[m]atters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). As the Supreme Court explained, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). Thus, it is hardly surprising that courts have been particularly careful not to intrude upon quintessential sovereign prerogatives by creating a *Bivens* remedy in contexts involving armed conflict and national security. ...

Here, the context of Padilla's *Bivens* claims plainly implicates these matters. Padilla was detained by the military upon the decision of the President to designate him an "enemy combatant." He claims that the military detention was unconstitutional and seeks money damages from those who implemented this Presidential directive. His detention-related *Bivens* claims would require a court to consider the legality of a decision by the President to detain Padilla as an "enemy combatant." Padilla also seeks damages in regard to the lawfulness of his treatment while in military detention. Thus, a court would have to inquire into, and rule on the lawfulness of, the conditions of Padilla's military confinement and the interrogation techniques employed against him. Congress has not provided any such cause of action, and, as the district court concluded, a court should not create a remedy in these circumstances given the national security and war powers implications. ...

B. A *Bivens* Remedy Should Not Be Created Because Congress has Created Other Mechanisms

To Protect Padilla's Interests, But Chosen Not to Create a Damage Remedy.

In the national security and war powers context, "it is irrelevant to a special factors analysis whether the laws currently on the books afford * * * an adequate federal remedy." [*United States v. Stanley*, 483 U.S. [669] at 683 [(1987)]]. That being said, in addition to these compelling separation of powers factors suggesting hesitation, Congress has addressed Padilla's claimed harm in a manner that also calls for the federal courts to stay their hand in creating a damage remedy.

Even outside the national security and war powers context, where there is "any alternative, existing process for protecting" the plaintiff's interests, such existing process would raise the inference that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007). The congressionally-authorized mechanism need not provide for a damages action. *See Zimbelman v. Savage*, 228 F.3d 367, 371 (4th Cir. 2000). Instead, it is more than sufficient that it reflect Congress's chosen method for protecting the interest at stake, including its judgment as to who should and should not benefit from the scheme. ...

* * * *

Here, Congress has provided a set of mechanisms to prevent detainee mistreatment by the military and to challenge unlawful detention. These mechanisms must be viewed in the unique context presented: action by our military in carrying out its war powers where courts normally refrain from intervening, as we have discussed. Given Congress's delineation of when court involvement is appropriate and the war powers context of this case, no *Bivens* damages remedy should be created.

1. As to the lawfulness of detention and access to counsel claims, here there was an alternative congressionally authorized mechanism to protect the very interest he asserts. *See* 28 U.S.C. § 2241. By bringing a habeas action, Padilla was able to challenge the lawfulness of his detention and seek access to counsel to make that remedy meaningful. As we know, two days after military detention was authorized, Padilla's counsel filed a petition for a writ of habeas corpus challenging his military detention, and counsel access was sought. Eventually, this Court upheld his detention as lawful based upon facts stipulated by Padilla to resolve "whether the President has the authority to detain Padilla." *Padilla*, 423 F.3d at 390 n.. This Court also recognized the "importan[ce of] ... restrict[ing] the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat." *Id.* at 395.

Thus, Padilla had a congressionally-authorized mechanism for challenging the lawfulness of his detention. In the wartime context presented, the habeas process should preclude the creation of a *Bivens* remedy. The fact that the habeas statute provides no damage remedy or personal redress against Defense Department officials is not a ground for supplementing that remedy with a judicially-created money damage claim. *See Zimbelman*, 228 F.3d at 371. The wartime context, and the habeas statute together provide "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" in regard to Padilla's claim of unlawful military detention. *Wilkie*, 551 U.S. at 550.

2. With respect to allegations regarding Padilla's treatment, Congress has provided a set of enforcement mechanisms to prevent detainee mistreatment by the military. This scheme, combined with the unique context of the case, are convincing reasons to refrain creating a damages remedy.

First, as former Secretary Rumsfeld argues, the military is governed by a comprehensive system of military discipline that provides for the reporting of and investigation into any credible claims of detainee mistreatment. *See* Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq.* ... This scheme, created by the political branches pursuant to their near-plenary authority over military matters, is designed to protect the interests of detainees, and comprises the “alternative, existing process for protecting” the plaintiff’s interests that Congress selected. *Wilkie*, 551 U.S. at 550. ...

Further, Congress created special compensation schemes for personal injuries caused by the military. *See* Military Claims Act, 10 U.S.C. § 2733. ... In the Military Claims Act, Congress provided that the military “may settle, and pay in an amount not more than \$100,000, a claim against the United States for ... personal injury ... caused by a civilian officer or employee ... or a member of the ... Navy ... acting within the scope of his employment, or otherwise incident to noncombat activities of that department.” 10 U.S.C. § 2733(a). This compensation statute is one of “the various ‘enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries’ ” caused by the military, and show that an additional *Bivens* remedy should not be created in this context. *Chappell*, 462 U.S. at 299.

To be sure, military regulations might preclude or limit a claim brought by an “enemy combatant” detainee like Padilla. *Cf.* 32 C.F.R. § 750.45(a)(5) (allowing only property claims to be brought by prisoners of war); 32 C.F.R. § 750.44(I) (precluding claims by a “national... of a country in armed conflict with the United States, or an ally of such country, unless the claimant is determined to be friendly to the United States”). But the fact the Congress conferred upon the Secretary of the Navy the authority to define and limit the circumstances when such claims would be appropriate is a strong sign that this Court should not “add layers of process to what Congress has already provided” (*Zimbelman*, 228 F.3d at 371) by creating a *Bivens* remedy.

Additionally, Congress has repeatedly considered the rights of wartime enemies detained and interrogated in U. S. custody. *See, e.g.,* Detainee Treatment Act, § 1003(a) (prohibiting cruel, inhuman, or degrading treatment of detainees). While Congress has created and bolstered mechanisms to ensure that detainee treatment is lawful and appropriate, it has notably *declined* to create a damages remedy. Thus, in addition to the alternative review mechanisms described above, the fact that Congress has considered the issue, yet not created a damages remedy in court, should preclude the creation of a *Bivens* remedy here. *See Wilkie*, 551 U.S. at 550. In short, “Congress is in a far better a position than a court to evaluate the impact of a new species of litigation against those who act on the public’s behalf,” and “can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government’s employees.” *Id.* at 562...

* * * *

In sum, judicial creation of a damages remedy is inappropriate because this case implicates national security and war powers where the judicial branch normally stays its hand, and Congress has enacted other mechanisms to protect Padilla’s interests. This Court should therefore affirm the holding of the district court declining to create a *Bivens* remedy, without reaching the merits of his claims.

II. THE *BIVENS* CLAIMS ARE BARRED BY QUALIFIED IMMUNITY.

If this Court holds that no *Bivens* remedy should be created here, then it need not and should not reach the issue of qualified immunity in regard to those claims. If the Court does,

however, reach this issue, it should hold that the district court properly found the defendants entitled to qualified immunity.

* * * *

d. Criminal prosecutions and other proceedings

(1) Overview

As discussed in section 3.a., *supra*, the White House released a fact sheet on March 7, 2011 announcing the resumption of military commission proceedings. The fact sheet is available at www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-quant-namo-and-detainee-policy. Excerpts from the fact sheet in Sec. 3.a. include those addressing military commissions. Statements by the Secretary of Defense and the Attorney General, available at www.defense.gov/releases/release.aspx?releaseid=14316 and www.mainjustice.com/2011/03/07/statement-of-attorney-general-eric-holder-on-quantanamo-bay-and-detainee-policy/, also address the resumption of military commissions.

(2) Military commission proceedings

(i) Khalid Sheik Mohammed

On April 4, 2011, Attorney General Holder announced that he was referring to military commissions the prosecutions of Khalid Sheikh Mohammed and four other individuals accused of participating in the attacks of September 11, 2001. They had previously been indicted in federal court in the Southern District of New York. His statement announcing that decision is excerpted below and available in full at www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html.

* * * *

In November 2009, I announced that Khalid Sheikh Mohammed and four other individuals would stand trial in federal court for their roles in the terrorist attacks on our country on September 11, 2001.

* * * *

As the indictment unsealed today reveals, we were prepared to bring a powerful case against Khalid Sheikh Mohammed and his four co-conspirators—one of the most well-researched and documented cases I have ever seen in my decades of experience as a prosecutor. We had carefully evaluated the evidence and concluded that we could prove the defendants' guilt while adhering to the bedrock traditions and values of our laws. We had consulted extensively

with the intelligence community and developed detailed plans for handling classified evidence. Had this case proceeded in Manhattan or in an alternative venue in the United States, as I seriously explored in the past year, I am confident that our justice system would have performed with the same distinction that has been its hallmark for over two hundred years.

Unfortunately, since I made that decision, Members of Congress have intervened and imposed restrictions blocking the administration from bringing any Guantanamo detainees to trial in the United States, regardless of the venue. As the President has said, those unwise and unwarranted restrictions undermine our counterterrorism efforts and could harm our national security. Decisions about who, where and how to prosecute have always been—and must remain—the responsibility of the executive branch. Members of Congress simply do not have access to the evidence and other information necessary to make prosecution judgments. Yet they have taken one of the nation’s most tested counterterrorism tools off the table and tied our hands in a way that could have serious ramifications. We will continue to seek to repeal those restrictions.

But we must face a simple truth: those restrictions are unlikely to be repealed in the immediate future. And we simply cannot allow a trial to be delayed any longer for the victims of the 9/11 attacks or for their family members who have waited for nearly a decade for justice. ...

So today I am referring the cases of Khalid Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi to the Department of Defense to proceed in military commissions. Furthermore, I have directed prosecutors to move to dismiss the indictment that was handed down under seal in the Southern District of New York in December, 2009, and a judge has granted that motion.

Prosecutors from both the Departments of Defense and Justice have been working together since the beginning of this matter, and I have full faith and confidence in the military commission system to appropriately handle this case as it proceeds. The Department of Justice will continue to offer all the support necessary as this critically important matter moves forward. The administration worked with Congress to substantially reform military commissions in 2009, and I believe they can deliver fair trials and just verdicts. For the victims of these heinous attacks and their families, that justice is long overdue, and it must not be delayed any longer. ...

* * * *

On May 31, 2011, those five individuals were charged by military commission prosecutors with crimes in connection with their alleged roles in the September 11, 2001 attacks against the United States. They were charged with committing the following eight offenses: conspiracy; attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism. May 31, 2011, Department of Defense Press Release, available at www.defense.gov/releases/release.aspx?releaseid=14532.^{*****}

***** Editor’s note: On April 4, 2012, the Convening Authority of the Office of Military Commissions referred charges against all five to a military commission, and an arraignment date of May 5, 2012, was set.

(ii) Nashiri – USS COLE Bombing

On April 20, 2011, military commission prosecutors swore charges against Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri for capital crimes arising out of an attempted attack on the USS THE SULLIVANS in January 2000, an attack on the USS COLE in October 2000, and an attack on the MV Limburg in October 2002. April 20, 2011, Department of Defense Press Release, available at www.defense.gov/releases/release.aspx?releaseid=14821. On September 28, 2011, the Convening Authority of the Office of Military Commissions referred the charges to trial by military commission, and Nashiri was arraigned on November 9, 2011. The charges against him include perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hazarding a vessel.*

B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT

1. General

In August 2011, the State Department released the unclassified version of its report to Congress on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, submitted pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The report contained four parts. Part I addressed U.S. compliance with arms control agreements. Part II discussed compliance by Russia and other successor states of the Soviet Union with treaties and agreements the United States concluded bilaterally with the Soviet Union. Part III assessed compliance by other countries that are parties to multilateral agreements with the United States. And Part IV covered compliance with less formal commitments related to arms control, nonproliferation, or disarmament, such as the Missile Technology Control Regime (“MTCR”). The 2011 report covered the period from January 1, 2009 through December 31, 2010. The report is available at www.state.gov/documents/organization/170652.pdf.

2. Nuclear Nonproliferation

a. Overview

On May 10, 2011, Under Secretary of State for Arms Control and International Security Ellen Tauscher addressed the Arms Control Association’s annual meeting in Washington, DC. She opened her remarks with an overview, excerpted below, of the progress by the administration in the area of nuclear nonproliferation since President Obama’s 2009 speech

* Editor’s note: The military commission considered a series of pre-trial motions in early 2012, but no trial date has been set.

on the subject in Prague. See *Digest 2009* at 761-64 for discussion of the Prague speech. The full text of Ms. Tauscher's remarks is available at www.state.gov/t/us/162963.htm.

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Many of you have heard me speak many times about what this Administration intended to accomplish and what we have accomplished. In the two years since President Obama's speech in Prague, the Administration has taken significant steps and dedicated unprecedented financial, political, and technical resources to prevent proliferation, live up to our commitments, and to move toward a world without nuclear weapons.

Under the President's leadership, we have achieved the entry into force of the New START agreement, adopted a Nuclear Posture Review that promotes nonproliferation and reduces the role of nuclear weapons in our national security policy, and helped to achieve a consensus Action Plan at the 2010 Nuclear Nonproliferation Treaty Review Conference.

The Administration also convened the successful 2010 Nuclear Security Summit, helped secure and relocate vulnerable nuclear materials, led efforts to establish an international nuclear fuel bank, and increased effective multilateral sanctions against both Iran and North Korea.

As for what's next, our goal is to move our relationship with Russia from one based on Mutually Assured Destruction to one on Mutually Assured Stability. We want Russia inside the missile defense tent so that it understands that missile defense is not about undermining Russia's deterrent.

... Cooperation between our militaries, scientists, diplomats, and engineers will be more enduring and build greater confidence than any type of assurances.

We are also preparing for the next steps in nuclear arms reductions, including—as the President has directed—reductions in strategic, non-strategic, and non-deployed weapons. We are fully engaged with our allies in this process.

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b. Non-Proliferation Treaty ("NPT")

(1) Follow-up to NPT Review Conference

Representatives of the five permanent members of the UN Security Council ("P-5") met in Paris on June 30-July 1, 2011 for their first follow-up meeting to the NPT Review Conference. A July 1, 2011 State Department media note provided the joint statement of the P-5 on their meetings and reported that they continued discussions on transparency, mutual confidence and verification. To facilitate information exchange, the P-5 agreed to continue work on an agreed glossary of key nuclear terms, establishing a dedicated Working Group on Nuclear Definitions and Terminology. The P-5 decided to hold additional conferences in the context of the next NPT Preparatory Committee. The media note is available at www.state.gov/r/pa/prs/ps/2011/07/167492.htm.

(2) Nuclear-weapon-free zones

On May 2, 2011, President Obama transmitted to the Senate, for its advice and consent to ratification, Protocols 1, 2, and 3 to the South Pacific Nuclear Free Zone Treaty and Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty. S. Treaty Doc. 112-2 and S. Treaty Doc. 112-3. A May 2, 2011 White House Statement, available at www.whitehouse.gov/the-press-office/2011/05/02/statement-nuclear-free-zones-asia-and-africa, provided a brief explanation of the rationale for ratification:

Regional nuclear weapon free zone agreements reinforce both the commitment of nations not to pursue nuclear weapons and the nearly 65-year record of their non-use. The protocols to the treaties, once ratified, will extend the policy of the United States not to use or threaten use of nuclear weapons against regional zone parties that are members of the Nuclear Non-Proliferation Treaty and in good standing with their non-proliferation obligations.

President Obama's letters of transmittal for both treaties included the statement that entry into force of the protocols for the United States "would require no changes in U.S. law, policy, or practice." The transmittal of the South Pacific Nuclear Free Zone Treaty included an overview of the Protocols:

The three Protocols that accompany the Treaty were opened for signature on August 8, 1986. Protocol 1 is open for signature by the United States, France, and the United Kingdom. Each Party to Protocol 1 undertakes to apply certain prohibitions under the Treaty to the territories for which it is internationally responsible situated within the zone. Ratification of Protocol 1 by the United States would prohibit the manufacture, stationing, or testing of nuclear explosive devices in American Samoa or on Jarvis Island (a small, uninhabited island located about 1,500 miles south of Hawaii). The United States, France, and the United Kingdom signed Protocol 1 on March 25, 1996. Protocol 1 is in force for France and the United Kingdom.

Protocols 2 and 3 are open for signature by the United States, China, France, Russia and the United Kingdom—the nuclear-weapons States as defined by the ... NPT. Each Party to Protocol 2 undertakes not to use or threaten to use any nuclear explosive device against Parties to the Treaty or against any territory within the zone for which a State Party to Protocol 1 is internationally responsible. In addition, Protocol 2 Parties are prohibited from contributing to any act of a Treaty Party which would constitute a violation of the Treaty or to any act of another Protocol Party that would constitute a violation of a Protocol. The United States signed Protocol 2 on March 25, 1996, and it is in force for China, France, Russia, and the United Kingdom.

Each Party to Protocol 3 undertakes not to test any nuclear explosive device anywhere within the zone. The United States signed Protocol 3 on March 25, 1996, and it is in force for China, France, Russia, and the United Kingdom.

The transmittal to the Senate for advice and consent to ratification of Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty similarly included an overview of the Protocols:

The Treaty has three Protocols. Under Protocol I, which is open for signature by the United States, China, France, Russia, and the United Kingdom, the Protocol Parties undertake not to use or threaten to use a nuclear explosive device against any Party to the Treaty or against territories within the zone of Parties to Protocol III. Protocol I Parties also undertake not to contribute to a violation of the Treaty or Protocol I. Under Protocol II, which is open for signature by the United States, China, France, Russia, and the United Kingdom, the Protocol Parties undertake not to test or assist or encourage the testing of any nuclear explosive device anywhere within the zone or to contribute to any violation of the Treaty or Protocol II. ... Protocol III ...is open for signature only by France and Spain...

President Obama also announced at the East Asia Summit (“EAS”) in Bali, Indonesia in November 2011 that the United States and the other nuclear-weapons States under the NPT had reached an agreement with the Association of Southeast Asian Nations (“ASEAN”) to allow them to accede to the Southeast Asia Nuclear Weapons Free Zone Treaty protocol. A November 19, 2011 White House fact sheet, available at www.whitehouse.gov/the-press-office/2011/11/19/fact-sheet-east-asia-summit, stated:

...President Obama and other EAS leaders welcomed the successful conclusion of a 40-year long negotiation between ASEAN and the Nuclear Weapons States to enable the latter’s accession to the Southeast Asia Nuclear Weapons Free Zone Treaty (SEANWFZ) protocol. All sides have agreed to take the necessary steps to enable the signing of the protocol and its entry into force at the earliest opportunity.

c. Comprehensive Nuclear Test Ban Treaty

In her May 10 address to the Arms Control Association, Ms. Tauscher also discussed the Comprehensive Nuclear Test Ban Treaty (“CTBT”). That portion of her speech is excerpted below; the full text is available at www.state.gov/t/us/162963.htm. For background on the Obama administration’s determination to seek ratification of the CTBT, see *Digest 2009* at 764-66.

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...[L]et me turn to the Comprehensive Test Ban Treaty. President Obama vowed to pursue ratification and entry into force of the CTBT in his speech in Prague. In so doing the United

States is once again taking a leading role in supporting a test ban treaty just as it had when discussions first began more than 50 years ago.

As you know, in the aftermath of the Cuban Missile Crisis, the United States ratified the Limited Test Ban Treaty, which banned all nuclear tests except those conducted underground. ...

In the months after the crisis, President Kennedy used his new found political capital and his political skill to persuade the military and the Senate to support a test ban treaty in the hopes of curbing a dangerous arms race. He achieved a Limited Test Ban Treaty, but aspired to do more. Yet, today, with more than 40 years of experience, wisdom, and knowledge about global nuclear dangers, a legally binding ban on all nuclear explosive testing still eludes us.

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In our engagement with the Senate, we want to leave aside the politics and explain why the CTBT will enhance our national security. Our case for Treaty ratification consists of three primary arguments.

One, the United States no longer needs to conduct nuclear explosive tests, plain and simple. Two, a CTBT that has entered into force will obligate other states not to test and provide a disincentive for states to conduct such tests. And three, we now have a greater ability to catch those who cheat.

Let me take these points one by one.

From 1945 to 1992, the United States conducted more than 1,000 nuclear explosive tests—more than all other nations combined. The cumulative data gathered from these tests have provided an impressive foundation of knowledge for us to base the continuing effectiveness of our arsenal. But historical test data alone is insufficient.

Well over a decade ago, we launched an extensive and rigorous Stockpile Stewardship program that has enabled our nuclear weapons laboratories to carry out the essential surveillance and warhead life extension programs to ensure the credibility of our deterrent.

Every year for the past 15 years, the Secretaries of Defense and Energy from Democratic and Republican Administrations, and the directors of the nuclear weapons laboratories have certified that our arsenal is safe, secure, and effective. And each year they have affirmed that we do not need to conduct explosive nuclear tests.

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When it comes to the CTBT, the United States is in a curious position. We abide by the core prohibition of the Treaty because we don't need to test nuclear weapons. And we have contributed to the development of the International Monitoring System. But the principal benefit of ratifying the Treaty, constraining other states from testing, still eludes us. That doesn't make any sense to me and it shouldn't make any sense to the Members of the Senate.

I do not believe that even the most vocal critics of the CTBT want to resume explosive nuclear testing. What they have chosen instead is a status quo where the United States refrains from testing without using that fact to lock in a legally binding global ban that would significantly benefit the United States.

Second, a CTBT that has entered into force will hinder other states from advancing their nuclear weapons capabilities. Were the CTBT to enter into force, states interested in pursuing or

advancing a nuclear weapons program would risk either deploying weapons that might not work or incur international condemnation and sanctions for testing.

While states can build a crude first generation nuclear weapon without conducting nuclear explosive tests, they would have trouble going further, and they probably wouldn't even know for certain the yield of the weapon they built. More established nuclear weapons states could not, with any confidence, deploy advanced nuclear weapon capabilities that deviated significantly from previously tested designs without explosive testing.

Nowhere would these constraints be more relevant than in Asia, where you see states building up and modernizing their forces. A legally binding prohibition on all nuclear explosive testing would help reduce the chances of a potential regional arms race in the years and decades to come.

Finally, we have become very good at detecting potential cheaters. If you test, there is a very high risk of getting caught. Upon the Treaty's entry into force, the United States would use the International Monitoring System to complement our own state of the art national technical means to verify the Treaty.

In 1999, not a single certified IMS station or facility existed. We understand why some senators had doubts about its future, untested capabilities. But today the IMS is more than 75 percent complete. 254 of the planned 321 monitoring stations are in place and functioning. And 10 of 16 projected radio-nuclide laboratories have been completed. The IMS detected both of North Korea's two announced nuclear tests.

While the IMS did not detect trace radioactive isotopes confirming that the 2009 event was in fact a nuclear explosive test, there was sufficient evidence to support an on-site inspection. On-site inspections are only permissible once the Treaty enters into force. An on-site inspection could have clarified the ambiguity of the 2009 test.

While the IMS continues to prove its value, our national technical means remain second to none and we continue to improve them. Last week, our colleagues at the NNSA conducted the first of a series of Source Physics Experiments at the Nevada Nuclear Security Site. These experiments will allow the United States to validate and improve seismic models and the use of new generation technology to further monitor compliance with the CTBT. Senators can judge our overall capabilities for themselves by consulting the National Intelligence Estimate released last year.

Taken together, these verification tools would make it difficult for any state to conduct nuclear tests that escape detection. In other words, a robust verification regime carries an important deterrent value in and of itself. Could we imagine a far-fetched scenario where a country might conduct a test so low that it would not be detected? Perhaps. But could a country be certain that it would not be caught? That is unclear. Would a country be willing to risk being caught cheating? Doubtful, because there would be a significant cost to pay for those countries that test.

We have a strong case for Treaty ratification. In the coming months, we will build upon and flesh out these core arguments. We look forward to objective voices providing their opinions on this important issue. Soon, the National Academy of Sciences, a trusted and unbiased voice on scientific issues, will release an unclassified report examining the Treaty from a technical perspective. The report will look at how U.S. ratification would impact our ability to maintain our nuclear arsenal and our ability to detect and verify explosive nuclear tests.

Let me conclude by saying that successful U.S. ratification of the CTBT will help facilitate greater international cooperation on the other elements of the President's Prague

Agenda. It will strengthen our leverage with the international community to pressure defiant regimes like those in Iran and North Korea as they engage in illicit nuclear activities. We will have greater credibility when encouraging other states to pursue nonproliferation objectives, including universality of the Additional Protocol.

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On June 1, 2011, Rose Gottemoeller, Assistant Secretary of State for Arms Control, Verification, and Compliance, delivered remarks to the CTBT Organization in Vienna, Austria. Excerpts below from Ms. Gottemoeller's speech relate to U.S. participation in CTBT activities even prior to ratification by the U.S. The full text of Ms. Gottemoeller's remarks is available at www.state.gov/t/avc/rls/166086.htm.

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As the Administration engages the U.S. Senate the United States has increased its participation in all of the Preparatory Commission's activities in preparation for the entry into force of the CTBT, especially with respect to the effective implementation of the Treaty's verification regime. U.S. technical experts are working closely with their counterparts from the Provisional Technical Secretariat and with other experts from many Signatory States represented here today in collaborative efforts to improve the capabilities of the global International Monitoring System and the International Data Centre.

After an eight-year absence, U.S. experts since 2009 have been fully engaged in further developing the On-Site Inspection element of the verification regime, both from policy and technical perspectives. The United States has also continued to bear the full costs of operating, maintaining, and sustaining the 31 stations of the International Monitoring System assigned by the Treaty to the United States. These actions tangibly demonstrate the commitment of the United States to prepare for the entry into force of this Treaty.

While much has been accomplished, more hard work lies ahead. We need to maintain the momentum towards completion and maintenance of a fully functioning verification system. Such a system, meeting the requirements established by the PrepCom, serves as a strong deterrent for any State Party contemplating a nuclear test. Demonstrating that the Treaty can be verified also supports the argument that it should be ratified, and helps build further momentum for the Treaty's entry into force.

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On December 6, 2011, the State Department issued a press statement by Secretary Clinton welcoming Indonesia's ratification of the CTBT. Her statement repeated the commitment to seek U.S. Senate advice and consent to ratification of the CTBT and urged other states that have not yet ratified to join. Secretary Clinton's statement is available at www.state.gov/secretary/rm/2011/12/178317.htm.

d. Fissile Material Cut-off Treaty

On January 27, 2011, Assistant Secretary Gottemoeller addressed the UN Conference on Disarmament (“CD”) in Geneva. Excerpts follow from her discussion of the need for progress at the CD on the Fissile Material Cut-off Treaty (“FMCT”). Her remarks are available in their entirety at www.state.gov/t/avc/rls/155400.htm. See *Digest 2009* at 766-768 for prior developments in FMCT negotiations. See also Secretary Clinton’s address to the CD in Geneva on February 28, 2011, available at <http://geneva.usmission.gov/2011/02/28/secretary-clinton-our-long-term-goal-our-vision-is-a-world-without-nuclear-weapons/>. Ms. Gottemoeller provided further remarks on the FMCT on July 27, 2011 at a High Level Meeting (“HLM”) in New York on revitalizing the work of the CD, available at <http://usun.state.gov/briefing/statements/2011/169152.htm>.

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Mr. President, an FMCT long has been one of the key goals of multilateral arms control. A cutoff will provide a firm foundation for future disarmament efforts, and help to consolidate the arms control gains made since the end of the Cold War. It is one of the key steps called for in the Final Document of the NPT Review Conference. An FMCT’s verifiable controls on fissile material will play an important role by strengthening confidence among the relevant states and help to create the conditions for a world without nuclear weapons.

Mr. President, no other world body of sovereign states is better suited to negotiate an FMCT. We readily acknowledge that an FMCT would have profound security implications for countries that have unsafeguarded nuclear facilities, including the United States of America. Under the CD’s rules of procedure and consensus principle, every State assembled in this room will have an equal opportunity to defend its interests and ensure that an FMCT does not harm its vital interests.

The entire point of seeking to pursue an FMCT here, in the CD, is precisely because of the consensus principle undergirding this body’s substantive work. No country need fear the outcome of FMCT negotiations. And no country should feel it necessary to abuse the consensus principle and frustrate everyone else’s desire to resume serious disarmament efforts and negotiations.

Time Is Running Out

In short, Mr. President, it’s time for the members of this body to approve a program of work and get started on FMCT negotiations in the CD. If we cannot find a way to begin these negotiations in the Conference on Disarmament, then we will need to consider other options. The calls for exploring such alternatives were in evidence at this year’s HLM and during the subsequent UNGA First Committee session. The longer the CD languishes, the louder and more persistent such calls will become.

Should we not be able to agree to begin negotiations now, in preparation for CD negotiations on a Fissile Materials Cutoff Treaty, we strongly support the idea of robust plenary discussion on broad FMCT issues, reinforced by expert-level technical discussions on specific FMCT topics which could further inform CD plenary exchanges.

This work will be, not a substitute for FMCT negotiations in the CD, but healthy intellectual homework that will prepare the way for what almost certainly will be a difficult negotiation.

We urge every CD Member State to dispatch to Geneva scientific and technical experts on fissile material to support such discussions here in the coming weeks. The U.S. experts will follow me here in several weeks, and be available to contribute to discussions in the CD, and hold meetings on the margins with interested delegations.

We look forward to contributing to these FMCT discussions, in CD plenary and, informally, elsewhere in the Palais, and hope that they will shed light on our own views and on the views of others.

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The continued stalemate on FMCT negotiations at the Conference on Disarmament prompted the P-5 to renew efforts to promote the negotiations. Representatives of the P-5 met in Geneva in August to discuss how to achieve their shared goal of a FMCT in the CD. In her remarks at a high level workshop against Nuclear Tests in New York, New York on September 1, 2011, Deputy Assistant Secretary of State for Arms Control, Verification and Compliance Marcie B. Ries reported on these discussions and expressed the hope of the United States that the P-5 “working with other relevant partners, will be able to chart a productive path forward,” on the FMCT. Ms. Ries’ statement is available at www.state.gov/t/avc/rls/171370.htm. On December 13, 2011, Assistant Secretary Gottemoeller delivered remarks at a Conference in the United Kingdom on “Challenges of the Nuclear Nonproliferation Regime” in which she reported on progress in commencing FMCT negotiations. Excerpts from her remarks follow. The full text of Ms. Gottemoeller’s December 13 remarks is available at www.state.gov/t/avc/rls/179167.htm.

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I am also glad to be here talking about the development of a Fissile Material Cut-off Treaty (FMCT). As you all know, an FMCT has long been one of the key goals of multilateral arms control. A cut-off will provide a solid foundation for future disarmament efforts, and help to consolidate the arms control gains made since the end of the Cold War. An FMCT’s verifiable controls on fissile material production will play an important role by strengthening confidence among the relevant states and help to create the conditions for a world without nuclear weapons. The United States is firmly committed to making this Treaty a reality.

Though we believe that the Conference on Disarmament (CD) is the best-suited international body for negotiating a multilateral arms control agreement, we’ve made no secret of our frustration with the CD’s current impasse with FMCT—a frustration shared by many countries. Secretary Clinton told the CD our patience is not unlimited and I will reiterate that sentiment here. We are in a race against time and these obtrusive delays put our collective security at risk. However, the United States is encouraged that the P5 is renewing joint efforts to move the CD closer to FMCT negotiations.

To CD or Not to CD?

Of course, for any negotiation to be substantive and worthwhile, the key states most directly affected by an FMCT should be involved. When it comes down to what is in the best interest of international security, the negotiating venue for the FMCT is of less importance than the participants.

That being said, there is no current consensus among these key states to negotiate an FMCT outside the CD. We believe that it is unlikely that any—much less all—of the non-NPT states would participate in efforts such as technical expert talks in Vienna, which is one idea that has been circulated. It is not even clear that all P5 states would participate in such outside efforts.

Technical discussions that lack key participants are also unlikely to be fruitful. Indeed, they could actually serve to undermine the sense within the international community that FMCT is ripe for negotiation. We should be wary of unworkable technical proposals that create unrealistic expectations and move us further from the needed consensus. This is a risk we should not take as we seek to create and sustain momentum for an FMCT. The fact is that the key obstacles to FMCT negotiations are political, not technical.

There are also those who propose moving FMCT negotiations to the United Nations General Assembly. The UNGA, as a rule, operates by majority vote, although there have been exceptions, such as with the Arms Trade Treaty. Again, it is doubtful that the key states would participate in such a process, particularly if it does not operate by consensus. Simply put, negotiations will have to be consensus-based to get key states involved, similar to the process in the consensus-based CD. It is hard to see how a non-consensus-based strategy outside of the CD would be more effective in getting meaningful negotiations underway than striving to break the impasse at the CD.

With the goal of approaching this issue with the involvement of all key players, at last June's Paris Conference, the P5 committed to renewed efforts with other relevant parties to promote FMCT negotiations in the CD. The P5 continued their discussion in Geneva in August and met again in October in New York on the margins of the United Nations First Committee. This multilateral effort is already producing positive effects.

We were pleased that India, a key FMCT stakeholder, joined the P5 at the October meeting. The P5 is continuing to discuss this issue with Pakistan and Israel individually. We hope we will be able to also include additional countries as these consultations continue to go forward.

It seems that for now, our best hope is in the efforts of the P5 Plus consultative process. It is true that this process will need time to develop further and that resolving the issues that have created gridlock in the CD will be difficult. Still, we believe this course of action has the best potential to move the CD to action on the FMCT in 2012.

Amending the Consensus Rule?

There is some talk of amending the consensus rule at the CD, in order to break the current logjam. The Weapons of Mass Destruction Commission made this argument in their 2006 Final Report.

The United States does not share the view that the impasse in the CD is the result of its procedural rules. On the contrary, the consensus rule has served CD members well by providing assurance that individual member states' national security concerns can be met. This is a point that the United States continues to make to Pakistan.

There may be a case for some modifications to how decisions are taken on small procedural items at the CD—such as agreement on meeting schedules and similar, administrative issues—but those issues are not at the heart of the impasse. The road will not be clear until all

members of the CD are convinced that commencing negotiations is in their national interest, or at least, not harmful to those interests. The United States is working hard to make the case to Pakistan—and all countries with reservations about the FMCT—that the commencement of negotiations is not something to fear.

Scope

Once FMCT negotiations have begun, CD members will face many complex and contentious issues, perhaps none so contentious as the issue of scope. We are well aware that CD members are divided on this issue. ...

The U.S. position is clear: FMCT obligations, including verification obligations, should cover only new production of fissile material. The United States has taken a step-by-step approach to reducing our nuclear arsenal in negotiations with the Soviet Union and now Russia. A step-by-step approach would serve us well with an FMCT. One essential step in the process should be codifying a legal ban on the production of fissile material for use in nuclear weapons.

We are fully aware that many CD members have a different view and this issue will be the subject of vigorous debate. That is what negotiations are for, and the United States looks forward to that debate. What is not helpful is an effort to “pre-negotiate” the outcome of negotiations by an explicit reference to existing stocks in a negotiating mandate. We would not be alone in seeing this as a thinly-veiled effort to prevent negotiations from getting underway.

Verification

Another potential challenge in the negotiating process will be the creation of a verification regime. The United States supports an effectively verifiable FMCT and believes that sufficient measures can be taken to ensure that a militarily significant diversion of newly-produced fissile material can be detected in a timely manner.

The IAEA already has the requisite tools and experience to monitor declared facilities. Safeguards on enrichment and reprocessing plants have been well developed, and improvements to these techniques continue to be made. While FMCT verification will have different goals than those of traditional IAEA safeguards, many of these proven techniques will be of direct relevance.

Procedures will, of course, need to be developed for non-routine inspections to detect undeclared production facilities in states with a long history of fissile material production outside of Safeguards. Drawing on established regimes, such inspections should include managed access or other procedures (e.g., confidence-building measures) to balance the inspectorate’s right of access against the need to protect information that is sensitive for proliferation, proprietary, or other reasons. This will be a challenge as it is in all verification efforts, but it is a challenge we believe can be met.

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e. NSG Guidelines

On June 23, 2011, the White House issued a statement on new Nuclear Suppliers Group (“NSG”) guidelines that limit transfers of sensitive nuclear technologies. The statement appears below and is available at www.whitehouse.gov/the-press-office/2011/06/23/statement-press-secretary-new-rules-sensitive-nuclear-trade-approved-nuc.

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The United States welcomes the decision of the 46-member Nuclear Suppliers Group (NSG) to approve new guidelines covering transfers of sensitive nuclear technologies used for the enrichment of uranium or the processing of spent nuclear fuel. This decision establishes agreed criteria that limit allowed transfers only to those nations in compliance with their nonproliferation obligations and that meet agreed standards for nuclear safeguards, safety and security. This Administration remains committed to ensuring that nations in good standing can have access to peaceful nuclear energy without increasing the risks of nuclear weapons proliferation. This latest step, coupled with the agreement last December to establish an International Atomic Energy Agency nuclear fuel bank, advances the President's nuclear agenda laid out in Prague in 2009. It further demonstrates the clear determination of nations to strengthen the international nonproliferation regime and build new frameworks for civil nuclear cooperation.

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f. Nuclear Security and Safety

(1) Joint action plans to combat nuclear smuggling

In 2011, the United States continued its Nuclear Smuggling Outreach Initiative ("NSOI"), with negotiations leading to the conclusion of joint action plans to combat nuclear smuggling with Moldova in July, Tajikistan in November, and Slovakia in December. NSOI had previously completed joint action plans with Ukraine, Kazakhstan, Georgia, the Kyrgyz Republic, Armenia, and the Democratic Republic of the Congo. For more information on these joint action plans and NSOI generally, see www.nsoi-state.net/. On December 7, 2011, upon reaching agreement with Slovakia on a joint action plan, Secretary Clinton delivered remarks at NATO Headquarters in Brussels. Secretary Clinton's remarks are excerpted below and are available in full at www.state.gov/secretary/rm/2011/12/178445.htm.

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... There is no greater threat to the safety and security of our world than preventing nuclear or highly radioactive materials coming into the hands of terrorists, and it's a danger that no one country can protect against on its own. And today, Slovakia has made an important commitment to our collective efforts, and we are very appreciative.

My country has now signed nine such agreements with other countries around the world, but this is the first one we have signed with an EU nation and a NATO ally. So this agreement reflects Slovakia's strategic importance as a gateway to the EU as well as your government's commitment to exercising leadership in advancing nuclear security.

...[T]his agreement takes the form of an action plan. It specifies more than 40 steps our two governments intend to take to strengthen our mutual capacity to prevent, detect, and respond more effectively to the threat of nuclear smuggling. The United States has guaranteed our efforts to work with you to make sure that it's not only the two of us working together but our

neighbors, and particularly Slovakia's neighbors, because in a networked world like the one we live in today, all nations have to be committed to this joint effort.

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(2) Legislation required for nuclear security treaties

On April 13, 2011, the U.S. Department of Justice submitted legislation to Congress to implement four treaties relating to nuclear security: the 2005 Amendment to the Convention on Physical Protection of Nuclear Material ("CPPNM Amendment"), the International Convention for the Suppression of Acts of Nuclear Terrorism ("ICSANT"), the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Protocol"), and the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("Fixed Platforms Protocol"). A White House press statement issued on April 13, and available at www.whitehouse.gov/the-press-office/2011/04/13/statement-press-secretary-submission-legislation-required-four-key-nucle, explained that the legislation would build on the Senate's advice and consent to these treaties in 2008 and "update the U.S. Criminal Code to strengthen our ability to fully investigate and prosecute acts of nuclear terrorism." See *Digest 2007* at 1062-71 for background on the SUA Protocol and the Fixed Platforms Protocol and at 1076-78 for background on the CPPNM Amendment. See *Digest 2008* at 94-97 and 889-90 for discussion of Senate advice and consent to ratification of the four treaties.

(3) Nuclear safety in the aftermath of the accident at the Fukushima nuclear power plant

On March 11, 2011, an earthquake registering 9.0 on the Richter scale struck the northeastern coast of Japan and triggered tsunami waves that caused extensive damage to life and property and severely damaged the Fukushima Nuclear Power Plant. The United States government and the International Atomic Energy Agency ("IAEA") took several steps in the aftermath of the Fukushima accident to improve and ensure nuclear safety. Issues relating to the Fukushima disaster were the topic of a Ministerial Conference at the IAEA in June 2011. See www.iaea.org/conferences/ministerial-safety/ for conference highlights and resources. U.S. Department of Energy Deputy Secretary Daniel B. Poneman made the national statement for the United States, available at <http://vienna.usmission.gov/110620poneman.html>.

Fukushima's aftermath was on the agenda again at the September meeting of the IAEA Board of Governors. On September 12, 2011, Ambassador Glyn Davies, U.S. Permanent Representative to the IAEA, welcomed the IAEA Director General's completion of an Action Plan for Nuclear Safety. The 151 member states of the IAEA unanimously endorsed the Action Plan on September 22, 2011. The Action Plan is available at www.iaea.org/About/Policy/GC/GC55/Documents/qc55-14.pdf. Ambassador Davies'

statement, excerpted below, is available at
<http://vienna.usmission.gov/110912fukushima.html>.

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While we understand that we are still in the process of learning lessons from the accident at the Fukushima Dai-ichi nuclear power plant, this Action Plan is a sound beginning to learn and act upon what we now know. The Plan is meant to incorporate aspects involving nuclear safety, emergency preparedness and response, and radiation protection of people and the environment, as well as the relevant legal framework.

This Action Plan is the product of a great deal of dialogue and discussion among Member States and with the Secretariat. It addresses the strengthening of nuclear safety in light of the Fukushima accident through twelve main actions. While they are all worthy and substantial actions, priorities must be established, with an emphasis on actions that directly relate to the lessons learned from Fukushima. In this regard, we believe Member States should focus their efforts initially on completing national assessments and implementing the results of those assessments.

In addition, to the extent practical, Member States and the Agency should utilize existing instruments and programs to undertake the actions. In this regard, we strongly encourage Member States to join and effectively implement the Conventions noted in the Action Plan.** Likewise, we urge Member States to join the Convention on Supplementary Compensation for Nuclear Damage as a step towards a global nuclear liability regime. These are steps that can, and should, be taken by any Member State with, or considering, a nuclear power program.

Mr. Chairman, the United States supports the Action Plan, and we stand ready to assist the Agency with implementation of the various actions. We note, however, that absent an initial cost estimate for implementing the Action Plan, it will be especially important to avoid duplicative and/or redundant efforts, and to take advantage of opportunities to cooperate with other international organizations, such as the NEA, and industry groups, to ensure the efficient use of existing resources.

We also note that the Board's approval of the Action Plan does not authorize any action that cannot be undertaken pursuant to the existing framework. Any changes to existing instruments and programs, or adoption of any new instruments or programs, must take place with full Member State involvement, to ensure a comprehensive, transparent and collaborative process and approach.

Finally, we reiterate our view that success of the Action Plan will be dependent on the full involvement of Member States, in a similar manner as we witnessed during the Ministerial Conference on Nuclear Safety and with the development of this Action Plan. We look forward to working with the Agency and Member States to strengthen nuclear safety in light of the Fukushima accident. Toward that end, the United States is pleased to join Member States in approving the Action Plan on Nuclear Safety.

** Editor's note: The conventions noted in the Action Plan are: the Convention on Nuclear Safety, the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management, the Convention on the Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.

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On September 22, 2011, Secretary Clinton addressed a high level meeting at the UN on the topic of nuclear safety. In her remarks, excerpted below and available in full at http://vienna.usmission.gov/st_092211.html, Secretary Clinton discussed the response to the accident at Fukushima.

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So this crisis, if the world needed one, is a very stark reminder that nuclear power requires comprehensive security precautions. Although nuclear safety has been a priority concern in the international community for years, it is clear that we need to redouble our efforts and our thinking as to how to imagine and then put in place reactions to whatever might occur.

The United States faced a core meltdown just 180 miles from here at Three Mile Island. The world recently marked the 25th anniversary of the Chernobyl disaster. None of us is immune. And on each of these occasions, the IAEA and nuclear regulatory bodies have moved to determine what went wrong and to try to prevent it from happening again. But it's imperative that every nuclear country be prepared for scenarios that include multiple severe hazards and prioritizes public safety. I think we have to take this opportunity to update our risk and safety assessments in nuclear power plants, to continue improving our international standards for nuclear safety, and strengthen our global emergency preparedness.

In this spirit, President Obama immediately ordered a comprehensive safety review of all 104 active nuclear power plants in the United States. Our Nuclear Regulatory Commission has already completed its near-term inspections and made recommendations for improving our regulatory framework and safety procedures. And as we design and construct next-generation nuclear power plants, we must integrate the lessons that we are still learning from Japan.

Each country must also similarly be responsible for ensuring their own reactors meet the highest, most up-to-date standards of safety. But we must set those standards here. And because a nuclear accident in one country can quickly become a transnational crisis, we are all vested in ensuring each other's success. That is why the United States supports the action plan on nuclear safety that the IAEA General Conference endorsed earlier today. It outlines steps to strengthen and expand the IAEA's peer review programs, improve emergency response training, enhance transparency and cooperation, and strengthen nuclear safety infrastructures around the world.

The IAEA safety standards are invaluable to the success of every country's nuclear energy program. They should be continually reviewed and revised as we learn more and detect new risks. The United States also calls on all nations with nuclear reactors to adhere to the Nuclear Safety Convention, which remains our best instrument for promoting international safety standards. We will continue to support the IAEA and the peer review process, both scheduling missions in the United States and contributing senior experts to missions in other countries. We look forward to working with our partners around the world to implement the provisions of the action plan.

The Obama Administration is committed to nuclear power as a component of our secure energy future, and we recognize that nuclear power is a vital contributor to the world's growing energy needs. It is, therefore, not an option that we simply can take off the table. But it is an

option that carries special risks and dangers. Therefore, we must do everything possible to ensure its safe and responsible use. We must remain vigilant against outside threats and internal weaknesses to prevent accidents from occurring. We must make continuous improvements to regulations and strengthen implementation of existing conventions so we hold ourselves, and others, to the highest standards. And we must have exhaustive international response plans in place so that if an accident does occur, the damage is contained as much as, and as soon as, possible.

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(4) Agreements with Mexico on converting research reactor from HEU to LEU

On April 13, 2010, President Obama convened heads of state for a summit on nuclear security in Washington, D.C. See *Digest 2010* at 800-802 for background. During this summit, Mexico, the United States, and Canada made a trilateral announcement to work together, with the IAEA, to convert the fuel in Mexico's research reactor from highly enriched uranium ("HEU") to low enriched uranium ("LEU") to further strengthen nuclear security on the North American continent. This 2010 Trilateral Announcement is available at www.whitehouse.gov/the-press-office/trilateral-announcement-between-mexico-united-states-and-canada-nuclear-security. During 2011, two executive agreements were concluded to enable the transfer of LEU by the United States, through the IAEA, to Mexico and the transfer of HEU from Mexico, through the IAEA, to the United States. These agreements were pursuant to, *inter alia*, the Agreement for Co-operation between the IAEA and the United States, signed May 11, 1959, as amended, and the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2153). The first was a trilateral agreement among the IAEA, Mexico, and the United States. It was signed on July 13, 29, and August 1, 2011, and entered into force on August 1, 2011. It is available at www.state.gov/documents/organization/177181.pdf. The second agreement was effected by an exchange of diplomatic notes between the United States and Mexico on November 18, 2011.***

g. Country-specific issues

(1) Democratic People's Republic of Korea ("DPRK" or "North Korea")

See Chapter 16.A.3.a.

(2) Iran

In November 2011, the International Atomic Energy Agency ("IAEA") Director General delivered a report on Iran's implementation of the NPT Safeguards Agreement and relevant

*** Editor's Note: On March 26, 2012, the United States, Canada, and Mexico announced at the 2012 Nuclear Security Summit the completion of this HEU-LEU transfer. See www.whitehouse.gov/the-press-office/2012/03/26/trilateral-announcement-between-mexico-united-states-and-canada-nuclear-.

provisions of the Security Council resolutions on Iran. The Director General's report included a detailed annex on possible military dimensions to Iran's nuclear program. On November 18, 2011, the United States provided a statement at the IAEA Board of Governor's meeting to discuss the Director General's report. The U.S. Statement, excerpted below, is available at <http://vienna.usmission.gov/111118iran.html>.

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As the Director General indicates, the IAEA's analysis is based on a broad array of information from open sources, from the Agency's investigations, from Iran, and from more than ten Member States. The Director General indicates that the IAEA views this information as credible, consistent, comprehensive and, contrary to Iran's persistent assertion that this broad array of information could only have been falsified, the IAEA judged that it is "not likely to have been the result of forgery or fabrication."

The Annex clearly outlines the credible information the Agency has amassed indicating that Iran had a nuclear weapons program and that some elements of that program continued past 2003. Specifically, the IAEA details numerous activities that are relevant to the development of a nuclear explosive device, including:

- Efforts to procure nuclear related and dual use equipment and materials by military related individuals and entities;
- Efforts to develop undeclared pathways for the production of nuclear material;
- The acquisition of nuclear weapons development information and documentation from a clandestine nuclear supply network; and,
- Work on the development of an indigenous design of a nuclear weapon, including the testing of components for the purpose of designing and developing a nuclear warhead for a ballistic missile.

The IAEA's report notes that some of these activities have both civil and military applications, but others, such as efforts to develop a missile payload with certain dimensions, detonation systems, and other characteristics, are specific to nuclear weapons. ...

Such a watershed report by the Director General is, by itself, reason for grave and increasing concern. But the combination of this report and of Iran's continuing noncompliance with a multitude of UN Security Council and Board of Governors' resolutions compounds that concern.

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On November 18, 2011, the IAEA Board of Governors adopted a resolution holding Iran accountable for failure to live up to its international obligations regarding its nuclear program. The White House press secretary issued a statement on the Iran resolution, agreeing with the IAEA's conclusion that Iran's nuclear program could not possibly be for civilian nuclear energy, but could only have the purpose of building a nuclear warhead for delivery on a ballistic missile. The White House statement is available at www.whitehouse.gov/the-press-office/2011/11/18/statement-press-secretary-todays-resolution-iaea-board-governors-iran. The White House statement also conveyed the

intended response of the United States to the IAEA report and resolution:

The United States commends the Director General and his Secretariat for their carefully prepared report, which is based on years of investigatory work, document analysis, and interviews with key personnel. The President has stated on multiple occasions that we are determined to prevent Iran from acquiring nuclear weapons. A nuclear armed Iran would represent a grave threat to regional peace and international security. This is why we have worked with others to build a broad international coalition to pressure and isolate the Iranian regime, including through an unprecedented sanctions regime. The United States will continue this pressure until Iran chooses to depart from its current path of international isolation, both in concert with our partners as well as unilaterally.

Secretary Clinton also issued a statement on November 18, 2011, welcoming the Board of Governor's resolution, agreeing with the conclusions of the Director General's report, and vowing to "work with our international partners to increase the pressure on Iran's government until it decides to meet its international obligations." Secretary Clinton's statement is available at www.state.gov/secretary/rm/2011/11/177357.htm. For a discussion of sanctions imposed in response to the IAEA Board of Governors resolution, see Chapter 16.A.2. and A.3.b.–c.

(3) *Syria*

On June 9, 2011, the IAEA Board of Governors adopted a resolution finding Syria in noncompliance with its international nuclear obligations. The IAEA concluded that Syria, with help from North Korea, had attempted to build a secret nuclear reactor capable of producing large amounts of nuclear weapons-usable plutonium with no apparent legitimate civilian purpose. The IAEA reported that Syria had refused to cooperate with its investigation into the nuclear reactor. A June 9 White House Statement, available at www.whitehouse.gov/the-press-office/2011/06/09/statement-press-secretary-iaea-board-governors-resolution-syria, welcomed the action, saying "Syria has stonewalled and obstructed the efforts of the IAEA to investigate the nuclear reactor for years, refusing to provide access to associated sites, personnel and documents in violation of Syria's freely-accepted legal obligations." Secretary Clinton also issued a statement on June 9 on the IAEA resolution, available at www.state.gov/secretary/rm/2011/06/165388.htm. Secretary Clinton's statement included the following condemnation of Syria's noncompliance:

The IAEA's latest report outlining the very likely construction of a covert nuclear reactor makes clear that Syria was violating its nonproliferation obligations. The report is also a troubling update of Syria's continued refusal to cooperate with the IAEA investigation and efforts to conceal the true purpose of the facility, which raise further serious concerns about Syria's compliance with its international obligations. Syria must fully cooperate with the IAEA by providing necessary access to all sites, items, and

information related to the Dair Alzour investigation and allow the IAEA to verify that Syria is fully complying with its safeguards agreement.

Syria is challenging the authority of the IAEA and the integrity of the nuclear Non-Proliferation Treaty regime. The only way Syria can demonstrate that it has come back into full compliance with the NPT is by cooperating with the IAEA and providing the necessary information and access.

The IAEA resolution referred Syria to the United Nations Security Council. On July 14, 2011, the Security Council met to address the resolution. Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations issued a statement on the Security Council's consultations on Syria's nuclear program, available at <http://usun.state.gov/briefing/statements/2011/168590.htm>. Ambassador Rice urged Syria to uphold its IAEA Safeguards Agreement and fulfill its previous commitments to provide access for the IAEA to sites and information relevant to its investigation. She stated, "Syria's positive and prompt cooperation with the IAEA would be the best way to resolve outstanding questions about its nuclear program."

(4) Agreement with Russia for cooperation on peaceful uses of nuclear energy

The bilateral agreements for cooperation on peaceful uses of nuclear energy that the United States negotiates are frequently referred to as "123 agreements" because the United States enters into them pursuant to § 123 of the Atomic Energy Act, 42 U.S.C. § 2153.

On January 12, 2011, the governments of the United States and Russia exchanged diplomatic notes bringing into force the Agreement between the Government of the United States of America and the Government of the Russian Federation for Cooperation in the Field of Peaceful Uses of Nuclear Energy, referred to as the U.S.-Russia 123 Agreement. A State Department fact sheet issued that day identified the following benefits of the agreement to the United States: "a solid foundation for long-term U.S.-Russia civil nuclear cooperation; commercial opportunities for U.S. industry; and enhanced cooperation on important global nonproliferation goals." The agreement is discussed in *Digest 2010* at 796-98. Excerpts from the January 12 fact sheet below describe nonproliferation and commercial goals advanced by the entry into force of the U.S.-Russia 123 Agreement. The full text of the fact sheet is available at www.state.gov/r/pa/prs/ps/2011/01/154318.htm.

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Nuclear Nonproliferation Cooperation: The 123 Agreement will create the conditions for improved cooperation on joint technology development to support arms control and nonproliferation activities. It will also provide the necessary legal framework for joint efforts to convert research reactors from highly-enriched uranium to low enriched uranium fuel. The 123 Agreement will aid cooperation on forensic analysis, allowing us to better identify nuclear

material and prevent it from getting into the hands of terrorists, and it will set the stage for expanded joint technical cooperation on next generation international safeguards.

Civil Nuclear Energy Cooperation: The 123 Agreement will facilitate cooperative work on reactor designs that result in reduced proliferation risk. It will create the conditions for advanced research and development projects that partner U.S. national laboratories and industry with Russian partners to explore new areas for collaboration, including fuel fabrication, innovative fuel types, and advanced reactor design.

Commercial Opportunities: The 123 Agreement will support commercial interests by allowing U.S. and Russian firms to team up more easily in joint ventures and by permitting U.S. sales of nuclear material and equipment to Russia. This will put the United States and Russia's nuclear relationship on a stronger commercial footing. Russian and U.S. firms will be able to develop advanced nuclear reactors, fuel-cycle approaches, and cutting-edge technology that are safe, secure, and reliable.

Civil Nuclear Energy Cooperation Action Plan: The 123 Agreement will allow long-term civil nuclear cooperation to proceed under the U.S.-Russian Presidential Commission Working Group on Nuclear Energy and Nuclear Security, specifically activities in the Civil Nuclear Energy Cooperation Action Plan which relate to reactor design, innovative nuclear energy technology options, and developing the global civil nuclear energy framework.

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(5) Plutonium Management and Disposition Agreement

On July 13, 2011, Secretary Clinton and Russian Foreign Minister Sergey Lavrov exchanged diplomatic notes bringing the U.S.-Russian Plutonium Management and Disposition Agreement ("PMDA") and its 2006 and 2010 protocols into force. See *Digest 2010* at 798-800 for a discussion of the 2010 protocol. A State Department fact sheet, excerpted below, explained the significance of the PMDA and its protocols in both countries' efforts to eliminate nuclear weapon-grade material and reduce nuclear dangers. The July 13 fact sheet is available at www.state.gov/r/pa/prs/ps/2011/07/168287.htm.

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The amended Agreement commits each country to dispose of no less than 34 metric tons of excess weapon-grade plutonium, under strict non-proliferation conditions. The initial combined amount, 68 metric tons, represents enough material for about 17,000 nuclear weapons, and the Agreement envisions disposition of more weapon-grade plutonium over time. Disposition of the plutonium is scheduled to begin in 2018.

Entry into force of the Agreement also represents a significant milestone in U.S.-Russian cooperation on nuclear security measures, and it marks an essential step in the nuclear disarmament process by making these reductions in plutonium stocks irreversible.

In addition, the Agreement breaks new ground on cooperative transparency. Pursuant to a joint request by Secretary Clinton and Foreign Minister Lavrov to International Atomic Energy

Agency (IAEA) Director General Amano last August, the two countries and the IAEA are making progress on appropriate IAEA verification measures for each country's disposition program.

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3. Renewed Mandate for 1540 Committee: U.N. Security Council Resolution 1977

On April 20, 2011 the Security Council unanimously adopted Resolution 1977, which extended the mandate of the 1540 Committee by ten years; formally established a Group of Experts to assist the Committee in carrying out its mandate; and provided for increased engagement with intergovernmental and international organizations. UN Doc. S/RES/1977. Strengthening Resolution 1540 had been a priority on the Obama Administration's nonproliferation agenda. See White House Statement on Resolution 1977, available at www.whitehouse.gov/the-press-office/2011/04/20/statement-passing-un-security-council-resolution-1977. Excerpts below from a State Department fact sheet on Resolution 1977, available at www.state.gov/t/isn/rls/fs/161355.htm, describe the importance of the 1540 Committee and welcome its renewed and strengthened mandate. For further background on Resolution 1540, see *Digest 2004* at 1092-118; *Digest 2006* at 1267; *Digest 2008* at 1007-8; and *Digest 2009* at 780-81. Ambassador Susan E. Rice, Permanent Representative to the UN, also released a statement welcoming passage of Resolution 1977, available at <http://usun.state.gov/briefing/statements/2011/161363.htm>. The State Department issued a separate fact sheet on November 9, 2011, available at www.state.gov/t/isn/rls/fs/177257.htm, on the U.S. voluntary contribution to the UN Trust Fund for Global and Regional Disarmament that was made in order to support the 1540 Committee.

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Since the 2004 adoption of UN Security Council Resolution 1540 (UNSCR 1540), member states have been obligated to make and enforce effective measures against WMD proliferation. All States have three primary obligations.

1. Prohibit support to non-state actors seeking WMD.
2. Adopt and enforce effective laws prohibiting the spread of WMD to non-state actors.
3. Enforce effective measures to control WMD.

UNSCR 1540 established a Committee to promote the resolution's implementation. The Committee has become a part of the international framework to prevent proliferation of nuclear, chemical, and biological weapons and their means of delivery. UNSCR 1540 works to strengthen cooperation among States and international organizations to help meet their obligations.

The Committee's new ten-year mandate extension will allow it to continue its work, aided now by a Group of Experts to assist it with more technical matters. UNSCR 1977 also encourages the Committee to form partnerships with regional and intergovernmental

organizations to promote universal implementation of UNSCR 1540. UNSCR 1977 also recognizes the importance of voluntary contributions to resource the Committee's activities.

The United States strongly supports the Committee's work and warmly welcomed UNSCR 1977. The United States has recently donated \$3 million to the UN to support the Committee to support implementation of UNSCR 1540.

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4. Chemical and Biological Weapons

a. Chemical weapons

(1) Annual compliance report to Congress

In August 2011, the State Department released its annual report to Congress on compliance by parties to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("CWC"). The report is submitted in accordance with one of the conditions of Senate ratification to the CWC in 1997, condition 10(c). Of 188 States Parties to the CWC, the 2011 report addressed compliance issues with six: China, Denmark, Iran, Iraq, Libya, and the Russian Federation. The full report is available at www.state.gov/t/avc/rls/rpt/170444.htm.

(2) Sixteenth Conference of States Parties to the Chemical Weapons Convention

The United States participated in the Sixteenth Session of the Conference of the States Parties to the CWC at The Hague from November 28 to December 2, 2011. On November 29, 2011, Ambassador Robert P. Mikulak, U.S. Permanent Representative to the Organization for the Prohibition of Chemical Weapons ("OPCW") delivered a statement on behalf of the U.S. In his statement, excerpted below, Ambassador Mikulak reviewed United States efforts to meet the April 2012 deadline for destruction of chemical weapons stockpiles. The full text of Ambassador Mikulak's statement is available at www.opcw.org/index.php?eID=dam_frontend_push&docID=15248.

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A fundamental goal of this Organisation that is certainly on everyone's mind this week is the total destruction of chemical weapons. For the United States, the safe and environmentally sound destruction of more than 27,000 metric tons of assorted chemical weapons has been an enormous challenge. The United States has made significant strides towards meeting this challenge, and I am proud to report on these achievements.

The United States has met the 1%, 20%, and 45% treaty milestones. To date we have destroyed more than 89% of our Category 1 chemical weapons. The United States has also destroyed all of our former chemical weapons production facilities.

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We are also committed to transparency of our chemical weapons destruction programme, so that States Parties can evaluate our efforts for themselves. To that end, we have provided 90-day reports for the past five and one-half years that track our progress in three-month intervals. We have also made informal destruction presentations at every informal meeting of the Executive Council on chemical weapons destruction to offer frank and honest information on our programme. We have invited Executive Council representatives to make site visits to our facilities and meet with senior officials—which allow an opportunity for these representatives to judge for themselves what we are doing, based on their own observations. In fact, the participants in an Executive Council visit to two U.S. facilities in March 2011 stressed that they came away with a better understanding of the local and technical challenges the United States has successfully overcome and the strong U.S. commitment to the Chemical Weapons Convention.

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This week, the Conference must take a fundamental decision on the way forward for this Organisation regarding the likelihood that the United States and Russia will miss the 29 April 2012 final extended deadline for the complete destruction of their chemical weapons stockpiles. We welcome the action taken by the Executive Council last week to forward a recommendation to the Conference. The recommended draft decision garnered overwhelming support in the Executive Council and is the result of two years of negotiation. It has many shortcomings, but it represents a precarious balance of interests and concerns.

Last week, the Executive Council demonstrated the political will to deal seriously and decisively with this important issue. This week it will be incumbent on the Conference to recognise the results of two years of intense negotiations and demonstrate equal political will in adopting the draft resolution recommended by the Executive Council. We hope that it can be approved by consensus, or if consensus is not present, by an overwhelming majority.

One of the most important developments of the last twelve months was the Director-General's initiative to begin a dialogue with States Parties on the future of the OPCW. We welcome this initiative. The report of the advisory group, and the Director-General's comments, provide a broad strategic vision and a number of very useful recommendations. I look forward to continuing discussions on the future of the OPCW with colleagues, a process that began in September with the very useful ambassadorial-level retreat at Noordwijk. This topic will naturally also be a critical element in our preparations for the Third Review Conference.

There is naturally a tendency to think of the future of the OPCW in terms of the advisory group report. But we also need to be aware that some of the decisions that we are addressing this week also will have a major influence on whether the OPCW continues to be a successful and effective international organisation—an organisation that is a model and an inspiration to others. I have already mentioned the importance of the Conference taking a decision on the 2012 deadline issue.

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On December 1, 2011, the Conference to the CWC, by a vote of 101 to 1, approved a decision reaffirming the April 2012 deadline but allowing that States Parties which had not completed the destruction of their stockpiles, due to reasons unrelated to their commitment to the CWC, should complete the destruction “in the shortest time possible” in accordance with the CWC. Iran was the only party to vote no. The December 1 Conference Decision, excerpted below, is available at www.opcw.org/index.php?eID=dam_frontend_push&docID=15220.

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Noting the statements by Libya, the Russian Federation, and the United States of America underlining their unequivocal commitment to their Obligations under Articles I and IV of the Convention for the destruction of their remaining chemical weapons in accordance with the provisions of this Convention and **taking note** that the inability to fully meet the final extended deadline of 29 April 2012 would come about due to reasons that are unrelated to the commitment of these States Parties to the General Obligations for the destruction of chemical weapons established under Article I of the Convention;

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1. **Decides** that the Sixty-Eighth Session of the Executive Council shall be held immediately after the expiry of the final extended deadline of 29 April 2012 for the destruction of chemical weapons;

2. **Requests** the Director-General of the Organisation’s Technical Secretariat (hereinafter referred to as the “Director-General”) to report to the Sixty-Eighth Session of the Executive Council whether or not the final extended deadline has been fully met. The report to be submitted is to include information on the quantities of chemical weapons that have been fully destroyed and that remain to be destroyed by each of the possessor States concerned;

3. **Decides** that, if the Director-General reports that the final extended deadline has not been fully met, the following measures are to be implemented by the Organisation and the possessor States concerned:

(a) The destruction of the remaining chemical weapons in the possessor States concerned shall be completed in the shortest time possible in accordance with the provisions of the Convention and its Verification Annex and under the verification of the Technical Secretariat of the Organisation as prescribed under the Convention and its Verification Annex.

(b) The costs for the continued destruction of the chemical weapons by the possessor States concerned and the verification of their destruction shall continue to be met in accordance with Paragraph 16 of Article IV of the Convention;

(c) Each possessor State concerned is to submit a detailed plan for the destruction of its remaining chemical weapons, which are to be destroyed in the shortest time possible, to the Sixty-Eighth Session of the Executive Council. The plan submitted by each possessor State, which is to also be considered and noted by the Council at its Sixty-Eighth Session, is to specify

the planned completion date by which the destruction of its remaining chemical weapons is to be completed (hereinafter referred to as the “planned completion date”). The possessor States concerned are to take appropriate measures to meet the planned completion date. The detailed plan is to inter alia specify:

- (i) A schedule for destruction, giving types and approximate quantities of chemical weapons planned to be destroyed in each annual destruction period until completion for each existing destruction facility and, if possible, for each planned destruction facility.

- (ii) The number of destruction facilities existing or planned to be operated over the destruction period until completion.

- (iii) For each existing and planned chemical weapons destruction facility:

- a. Name and location;

- b. The types and approximate quantities of chemical weapons, and the type (for example, nerve agent or blister agent) and approximate quantity of chemical fill, to be destroyed.

The submission of this detailed plan for destruction does not alter, modify or cancel any other requirements contained in the Convention and its Verification Annex for the submission of other destruction plans.

- (d) Each possessor State concerned is to report, and provide a briefing in a closed meeting, at each regular session of the Executive Council on the progress achieved towards the complete destruction of remaining stockpiles, including information on measures to accelerate such progress, and identifying progress made since the last briefing in order to meet the planned completion date. These reports and briefings are to also include reporting on any specific measures undertaken to overcome problems in the destruction programme.

- (e) The Director-General is to provide a written report at each regular session of the Executive Council on the overall destruction progress by the possessor States concerned that is based on the independent information that is received by the Technical Secretariat from the Organisation’s inspectors undertaking verification in accordance with Part IV (A) D of the Verification Annex and that is to include information on:

- (i) The progress achieved to meet the planned completion date(s).

- (ii) The effectiveness of any specific measures that have been undertaken to overcome problems in the destruction programmes.

- (f) The Conference of the States Parties is to undertake an annual review of the implementation of this decision at a specially designated meeting(s) of the Conference. At the annual Conference of the States Parties in 2017 an extra day is to be added for a specially designated meeting(s) for this purpose, unless otherwise decided at the Conference of the States Parties in 2016. Each possessor State concerned is to provide an annual report to the Conference of the States Parties, and provide an annual briefing at a closed meeting of the Conference of the States Parties, on the progress in the destruction of its remaining stockpiles of chemical weapons and identifying progress made since the last briefing in order to meet planned completion date. These reports, and briefings, are to also include:

- (i) Reporting on any specific measures undertaken to overcome problems in the destruction programmes.

- (ii) Information on the projected schedule for destruction activities to meet the planned completion date.

(g) The Director-General is to provide an annual written report to the Conference of the States Parties on the overall destruction progress by the possessor States concerned that is based on the independent information that is received by the Technical Secretariat from the Organisation's inspectors undertaking verification in accordance with Part IV (A) D of the Verification Annex and that is to include information on:

(i) The progress achieved to meet the planned completion date(s).

(ii) The effectiveness of any specific measures that have been undertaken to overcome problems in the destruction programmes.

(h) The Review Conference is to conduct a comprehensive review on the implementation of this decision at a specially designated meeting(s) of the Conference. This review is to be based on:

(i) Reports by the possessor States concerned on the progress achieved to meet the planned completion date. These reports are to also include:

a. Reporting on any specific measures undertaken to overcome problems in the destruction programmes.

b. Information on the projected schedule for destruction activities to meet the planned destruction date.

(ii) A written report by the Director-General of the Technical Secretariat that is based on the independent information that is received by the Technical Secretariat from the Organisation's inspectors undertaking verification in accordance with Part IV (A) D of the Verification Annex and that is to include information on:

a. The progress achieved to meet the planned completion date(s).

b. The effectiveness of any specific measures that have been undertaken to overcome problems in the destruction programmes.

(i) The submission of the reports under operative paragraphs 3 (d), (f) and (h)i of this decision do not alter, modify or cancel any other requirements contained in the Convention and its Verification Annex for the submission of other reports.

(j) The possessor States concerned are to invite the Chairperson of the Executive Council, the Director-General and a delegation representing the Executive Council to undertake visits to obtain an overview of the destruction programmes being undertaken. These visits are to inter alia include visits to destruction facilities as well as meetings with parliamentarians, if possible, and government officials in capitals as a formal part of the visits. Invitations are to also be extended to observers to participate in the Executive Council delegation. The visits are to take place annually on the basis of biennial visits to the major possessor States concerned consecutively. Visits would also take place to Libya on a biennial basis.

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The United States also submitted a statement to the OPCW on December 19, 2011. Excerpts of the U.S. statement, replying to Iran regarding the recovery and destruction of pre-1991 Chemical Weapons in Iraq, appear below. The statement is available at www.state.gov/t/avc/rls/179692.htm.

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The United States would like to exercise its right of reply in writing to the Iranian national paper (C-16/NAT 20, 2 December 2011) in which Iran has alleged once again that the United States was not in compliance with the Chemical Weapons Convention in the manner in which it recovered and destroyed pre-1991 chemical weapons in Iraq. As we have informed Iran twice previously in writing (in September 2010 and February 2011), and as we have stated at the OPCW on earlier occasions, the United States rejects as unfounded any allegation that the United States violated its obligations under the Chemical Weapons Convention. United States forces secured and destroyed the referenced chemical weapons in Iraq under exceptional circumstances that were not encompassed by the procedural provisions of the Convention's Verification Annex. These actions were dictated by the imperative to ensure that the recovered chemical weapons could not be used to threaten the Iraqi people, neighboring states, Coalition forces, and the environment, and they were fully consistent with the object and purpose of the Convention to exclude completely the possibility of the use of chemical weapons. During the chemical weapons recovery and destruction operations carried out by United States forces, verification of destruction activities in Iraq by the OPCW Technical Secretariat was not feasible. Moreover, reporting these activities contemporaneously would have posed a threat to the safety and security of the personnel conducting the activity, the local population and the environment. However, the United States ensured that officials of the Technical Secretariat were made aware of U.S. activities and, when the security situation in Iraq permitted, made appropriate notification to the OPCW and the Executive Council of the actions taken. Records related to these activities were made available to the Technical Secretariat in the interests of transparency and the spirit of the Convention. The United States has participated constructively and in good faith in discussions to develop guidelines for future instances of destruction of chemical weapons in circumstances not foreseen by the Convention.

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b. *Biological weapons*

On October 4, 2011, Assistant Secretary of State for the Bureau of International Security and Nonproliferation Thomas Countryman delivered remarks on the Biological Weapons Convention ("BWC") at a conference at the Center for Biosecurity in Pittsburgh, Pennsylvania commemorating the ten-year anniversary of anthrax attacks in the United States. Excerpts follow from Mr. Countryman's remarks; the full text is available at www.state.gov/t/isn/rls/rm/175121.htm.

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The year 2001 was not only the year of the anthrax attacks. A few months before, in the summer of 2001, the U.S. officially withdrew its support for negotiations on a legally binding verification protocol for the Biological Weapons Convention. ... Those attacks demonstrated the ineffectiveness of the verification protocol in addressing what we might call "classical" biological weapons threats—states programs and even more the threat posed by non-state actors. By 2002, some of the states that we cooperated with, that were skeptical about our approach were conscious that the anthrax attacks here in Washington had changed the debate. The measures that we had proposed suddenly seemed relevant and important even to those who had

been the strongest advocates of a verification protocol focused on state activity. Getting countries to put in place domestic laws to deal with perpetrators of such acts, making labs safer and pathogens secure and training life scientists on the potential danger of the misuse of their work, all of these were very relevant to countering the threats that were revealed to the world in October 2001.

Our proposals foresaw—and the anthrax demonstrated—that ...the BW threat from non-state actors needed to be addressed, and focusing on what countries were doing domestically to counter this real-world threat from sub-state actors was both critical to our collective security and to achieving the goals of the Biological Weapons Convention.

This approach as we rolled it out in 2003-2005 intersessional period, was at first very Western-oriented. The procedures that we proposed and highlighted were very much centered on the methodologies of the technologically advanced industrialized world and put forth without gaining much buy-in from lesser developed nations. But the BWC quickly showed that it had this very important role of showcasing best practices for countering a wide range of biological threats. We demonstrated then, and we remain convinced today, that our approach must include measures to help with human, animal and plant diseases and their consequences. As we progressed, those countries that were actively engaged in the process brought their best scientists and practitioners to give briefings and interact with the diplomats and their counterparts from other countries. Fairly rapidly, a much wider array of states and other nongovernmental and intergovernmental actors recognized the relevance of this approach not just to their national security but to their public health. So, over those years, attendance by States Parties doubled in the first year from that of the Protocol negotiations and continues to increase year by year.

Between 2007 and 2010, the Biological Weapons Convention Work Program resumed its focus on biosafety and pathogen security, national implementation and codes of conduct for scientists, and also focused on disease surveillance capacity building and assistance in the event of a suspicious outbreak or alleged use of BW. This focus on disease surveillance, and the demonstration that SARS, H1N1 and H5N1 knew no boundaries—that concerted national and international coordination was needed—brought home the value of the work ongoing in Geneva. The meetings were no longer just for diplomats; we had participants from all parts of the world and had the interaction of the disarmament, scientific, law enforcement, academic and private sector communities. These meetings stimulated significant activity at the national level and increased the knowledge base around the world in best practices in biosafety and biosecurity, disease surveillance, in science education. This new approach started with limited and modest goals but it was clearly a success.

That is the last ten years. Of course, today, the threat has not gone away. We fully recognize that a major biological attack on one of the world's major cities could cause as much death and economic and psychological damage as a nuclear attack. And while the United States is still concerned about state-sponsored biological warfare and proliferation, we are equally, if not more, concerned about an act of bioterrorism due to the rapid pace of advances in the life sciences.

And so today, it is time for still more ambitious thinking.

As we go to the Biological Weapons Convention Review Conference in December in Geneva, our steps should line up with the aims of President Obama's National Strategy for Countering Biological Threats which was announced at the BWC two years ago. This strategy has a clear, overarching goal ... to protect against the misuse of science to develop or use biological agents to cause harm.

Let me outline - or I'm sure for this group, remind you of—the broadest goals of the national strategy:

First, that we will work with the international community to promote the peaceful and beneficial use of life sciences, in accordance with the Biological Weapons Convention's Article Ten, to combat infectious diseases regardless of their cause.

Second, we will work to promote global health security by increasing the availability of and access to knowledge and products of the life sciences to help reduce the impact from outbreaks of infectious disease, whether of natural, accidental, or deliberate origin.

Third, we will work toward establishing and reinforcing norms against the misuse of the life sciences. We seek to ensure a culture of responsibility, awareness, and vigilance among all who use and benefit from the life sciences.

And fourth, we will implement a coordinated approach to influence, identify, inhibit, and interdict those who seek to misuse scientific progress to harm innocent people.

These are the goals of the National Strategy that inform our approach and they have a few specific implications for our work between now and the Review Conference in December and beyond.

We will continue to seek timely and accurate information on the full spectrum of threats and challenges so that we can take appropriate actions to manage the evolving risk.

We will make clear, as we have in the National Strategy that the revolutionary advances that are taking place in the life sciences are overwhelmingly positive. We need to embrace and support those developments while taking balanced, appropriate, steps to minimize the risks posed by potential misuse.

To remain effective, the Biological Weapons Convention must continue to adapt to the wider range of biological threats we will face in this century. We need to continue to translate these strategic goals, which are shared overwhelmingly by the other States Parties to the BWC, to enhance the BWC still further.

We want to enhance the effectiveness of this Convention as the norm against biological weapons, through our actions and not only through our words. We have consulted widely, and we have listened widely, on how we can all benefit from a range of tools that increase mutual confidence; from specific confidence-building measures, to more frequent consultations, to proactive, national steps that demonstrate compliance by states.

We will seek endorsement of expanded efforts to prevent bioterrorism by strengthening national legislation and oversight in the States Party, fostering greater understanding of the scope of national implementation measures that the Convention requires and enlisting the support and cooperation of the international scientific and commercial sectors in these efforts.

We know that the best time for international assistance should come before, and not after, a biological weapons attack. We will continue to focus on providing targeted and sustainable international assistance, joined by other donors in the international community, aimed at building the national capacities in all countries to detect and respond to a disease outbreak, regardless of the cause, and identifying and addressing barriers to effective international response. We will take a multi-sectoral approach and seek assistance from other donors. ...

The intersessional process in between each Review Conference has been effective –and where the real work of the BWC has been done—more than in the Review Conference that will be in the spotlight in December. The intersessional process has brought together national security, public health, law enforcement, scientific and academic communities, private industry, and intergovernmental organizations that did not previously interact with the BWC, such as the

World Health Organization, Food and Agriculture Organization, and the World Organization for Animal Health. The Biological Weapons Convention has become, and should be, fully utilized as a forum to share information with all states of the bilateral and regional activities that relate to the BWC, to consult with each other on new avenues of bilateral and multilateral engagement, and to seek the support of the international community for national protection efforts. These activities, those States Party now realize will enhance their real-world capability and real-world security.

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We would like the Review Conference in December to reinvigorate, or to give added vigor, to this intersessional process, to continue this expert-level interaction and to look to more concrete results in such discussions. For example, we think that the convening authority of the BWC could bring in the emergency management community in greater efforts to determine the capabilities and resources needed in the event of an outbreak. We could do a better job sharing lessons learned regarding regulations that are needed to assist efforts at response and recovery efforts. We should have in-depth discussions about the latest developments in science and technology that could affect the BWC and we should be very open within the U.S., and the other leading BWC members, about sharing how we comply with our BWC obligations.

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Let me mention one more goal for this Review Conference for it is one of our oldest goals for the BWC and still valid today. We want to establish universal adherence. Universal membership will strengthen the global norm against the use of disease as a weapon and reinforce the international community's determination that such use would be, as the preamble to the BWC states, "repugnant to the conscience of mankind." There is reason to hope for additional membership. The process I have just described is becoming clear to others—that this process is not only about national security but also about their self-protection against a range of threats not just from other states but also from non-state actors, and all who have participated as States Party have gained in their capacity to respond to such threats. We think this gives added incentive to get those few states that have not yet become members of the BWC to join up and achieve this goal of universal adherence.

Just to sum up, the BWC and the parties to it have kept current with countering modern day threats. This is the right moment as we go to this Review Conference in December to reinforce our resolve to take additional practical steps to move forward jointly toward our greater mutual security.

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On December 7, 2011, Secretary Clinton addressed the Seventh BWC Review Conference in Geneva, Switzerland. BWC review conferences are held every five years. This was the first time a U.S. secretary of state had addressed a BWC review conference. Secretary Clinton's remarks, excerpted below, are available in full at www.state.gov/secretary/rm/2011/12/178409.htm.

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I want to start by acknowledging that our countries have accomplished a great deal together under the Biological and Toxin Weapons Convention. One hundred sixty-five states have now committed not to pursue these weapons, and I am delighted to welcome Burundi and Mozambique to the Convention, and I join in urging all states who have not yet done so to join.

President Obama has made it a top goal of his Administration to halt the spread of weapons of mass destruction, because we view the risk of a bioweapons attack as both a serious national security challenge and a foreign policy priority. In an age when people and diseases cross borders with growing ease, bioweapons are a transnational threat, and therefore we must protect against them with transnational action.

The nature of the problem is evolving. The advances in science and technology make it possible to both prevent and cure more diseases, but also easier for states and non-state actors to develop biological weapons. A crude, but effective, terrorist weapon can be made by using a small sample of any number of widely available pathogens, inexpensive equipment, and college-level chemistry and biology. Even as it becomes easier to develop these weapons, it remains extremely difficult—as you know—to detect them, because almost any biological research can serve dual purposes. The same equipment and technical knowledge used for legitimate research to save lives can also be used to manufacture deadly diseases.

So of course, we must continue our work to prevent states from acquiring biological weapons. And one of the unsung successes of the Convention is that it has engrained a norm among states against biological weapons. Even countries that have never joined the Convention no longer claim that acquiring such weapons is a legitimate goal. But unfortunately, the ability of terrorists and other non-state actors to develop and use these weapons is growing. And therefore, this must be a renewed focus of our efforts during the next 14 days, as well as the months and years ahead.

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Two years ago, the Obama Administration released our national strategy for countering biological threats, which is a whole-of-government approach designed to protect the American people and improve our global capacity. We support our partners' efforts to meet new international standards in disease preparedness, detection, and response. We are helping make laboratories safer and more secure, engaging 44 countries in these efforts this year. And since 2007, we've conducted more than a dozen workshops to help train public health and law enforcement officials.

But there is still more to do, and I want to briefly mention three areas. First, we need to bolster international confidence that all countries are living up to our obligations under the Convention. It is not possible, in our opinion, to create a verification regime that will achieve this goal. But we must take other steps. To begin with, we should revise the Convention's annual reporting systems to ensure that each party is answering the right questions, such as what we are each all doing to guard against the misuse of biological materials.

Countries should also take their own measures to demonstrate transparency. Under our new Bio-Transparency and Openness Initiative, we will host an international forum on health

and security to exchange views on biological threats and discuss the evolution of U.S. bioresearch programs. We will underscore that commitment by inviting a few state parties to the Convention to tour a U.S. biodefense facility next year, as Ambassador van den IJssel and the UN 1540 Committee did this past summer. And we will promote dialogue through exchanges among scientists from the United States and elsewhere. In short, we are intending and our meeting our obligation to the full letter and spirit of the treaty, and we wish to work with other nations to do so as well.

Second, we must strengthen each country's ability to detect and respond to outbreaks and improve international coordination. As President Obama said earlier this year at the UN, "We must come together to prevent and detect and fight every kind of biological danger, whether it's a pandemic like H1N1, or a terrorist threat, or a terrible disease." Five years ago, 194 countries came together at the World Health Organization and committed to build our core capacities by June 2012, and we should redouble our efforts to meet that goal. We will support the WHO in this area, and I urge others to join us.

Finally, we need thoughtful international dialogue about the ways to maximize the benefits of scientific research and minimize the risks. For example, the emerging gene synthesis industry is making genetic material widely available. This obviously has many benefits for research, but it could also potentially be used to assemble the components of a deadly organism. So how do we balance the need for scientific freedom and innovation with the necessity of guarding against such risks?

There is no easy answer, but it begins with open conversations among governments, the scientific community, and other stakeholders, in this forum and elsewhere. We have recently had our U.S. President's Commission on Bioethics develop ethical principles that could be helpful in this dialogue, and we urge a discussion about them. Ambassador Kennedy and the U.S. team look forward to working with all of you for a strong set of recommendations.

And let me conclude by saying we know the biological threats we face today are new, but our commitment to face threats together is not. More than 85 years ago, after the horrors of World War I, the international community took a stand against the use of poison gases and bacteriological weapons. And nearly a half-century later, that shared commitment brought us together to adopt the Biological Weapons Convention. So in that same spirit, let us move forward to address the challenges we face together in the 21st century.

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Assistant Secretary Countryman provided a briefing on the outcome of the BWC Review Conference on December 23, 2011. Excerpts from that briefing appear below. The full text of the briefing is available at www.state.gov/t/isn/rls/rm/179689.htm.

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The United States is pleased with the outcome of the 7th Review Conference of the Biological and Toxin Weapons Convention that was adopted yesterday in Geneva. The final document adopted a program for what we call the intercessional period, the next five years before the next review conference, that will focus on three major topics: first, strengthening implementation of the convention, that is, the implementation legally and practically by each of the states party;

second, a regular and systematic review of scientific and technological developments in the life sciences relevant to the convention; and third, continuing to build capacity to deal with disease outbreaks, including capacity building in bio-safety, bio-security, disease surveillance, preparedness, and response.

These are the three areas that the United States emphasized when Secretary Clinton spoke to the conference on December 7th, and we're pleased, of course, that they are the focus of the final document. ...

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5. Ballistic Missile Defense

On September 2, 2011, the United States Department of State issued a press statement welcoming Turkey's decision to host a missile defense radar in support of NATO's common missile defense efforts. The press statement is available at www.state.gov/r/pa/prs/ps/2011/09/171633.htm.

On September 15, 2011, the Agreement between the Government of the United States of America and the Government of the Republic of Poland Concerning the Deployment of Ground-Based Ballistic Missile Defense Interceptors in the Territory of the Republic of Poland, as amended by the 2010 Protocol, entered into force. The original agreement is discussed in *Digest 2008* at 1009-11 and the 2010 Protocol is discussed in *Digest 2010* at 811-12. A September 15, 2011 State Department media note provided the joint statement of the parties announcing entry into force and explaining further that:

The U.S. Ballistic Missile Defense system will be located at Redzikowo Base as a part of the European Phased Adaptive Approach to missile defense in the 2018 timeframe. This base represents a significant contribution by our two nations to a future NATO missile defense capability.

Media note, available at www.state.gov/r/pa/prs/ps/2011/09/172439.htm.

On December 23, 2011, the Agreement between the Government of the United States of America and the Government of Romania on the Deployment of the United States Ballistic Missile Defense System in Romania entered into force. The United States and Romania issued a joint statement, announcing the Agreement's entry into force, available at www.state.gov/r/pa/prs/ps/2011/12/179665.htm. The statement added that:

The U.S. ballistic missile defense interceptor site will be located at Deveselu Air Base as a part of the European Phased Adaptive Approach to missile defense in the 2015 timeframe. This base represents a significant contribution by our two nations to NATO's missile defense efforts.

Secretary Clinton and Romania's Foreign Minister Teodor Baconschi signed the agreement on September 13, 2011. See fact sheet, available at

www.state.gov/r/pa/prs/ps/2011/09/172258.htm. The text of the agreement is available at www.state.gov/t/avc/trty/172915.htm

6. New START Treaty

On February 5, 2011, the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (“New START”) entered into force with the exchange of instruments of ratification between Secretary Clinton and Foreign Minister Lavrov. For background on the treaty, see *Digest 2010* at 812-821 and *Digest 2009* at 786–90. Entry into force in 2011 triggered the commencement of treaty-based verification activities by the parties, including on-site inspections of weapons facilities, exchanges of databases of weapons information, notifications of data changes, as well as meetings of the Bilateral Consultative Commission (“BCC”) established by the treaty. A February 5, 2011 State Department fact sheet, available at www.state.gov/r/pa/prs/ps/2011/02/156037.htm, outlined the various activities that commenced upon entry into force of the New START Treaty. On April 13, 2011, U.S. inspectors arrived in the Russian Federation for the first U.S. on-site inspection of Russian facilities under New START. See April 13, 2011 State Department media note, available at www.state.gov/r/pa/prs/ps/2011/04/160727.htm. The BCC held two sessions in 2011 to discuss implementation of the treaty, one in late March to early April and the second from late October to early November, both in Geneva. Further information on New START and its implementation can be found at www.state.gov/t/avc/newstart/index.htm.

7. Treaty on Conventional Armed Forces in Europe

In August of 2011, the Department of State submitted its report to Congress on compliance with the Treaty on Conventional Armed Forces in Europe (“CFE”) for the period December 1, 2009 to November 30, 2010. The report is available at www.state.gov/t/avc/rls/rpt/170445.htm. The report identified the following countries for which the President was not able to certify compliance with the CFE and related documents: Armenia, Azerbaijan, Belarus, Russia, and Ukraine. The report described compliance issues in those countries and U.S. responses and provided an assessment of the significance and security risks of compliance concerns.

On November 22, 2011, the United States announced that it would cease carrying out certain of its obligations under the CFE Treaty relating to Russia. A November 22 press statement explained:

This announcement in the CFE Treaty's implementation group comes after the United States and NATO Allies have tried over the past 4 years to find a diplomatic solution following Russia's decision in 2007 to cease implementation with respect to all other 29

CFE States. Since then, Russia has refused to accept inspections and ceased to provide information to other CFE Treaty parties on its military forces as required by the Treaty.

November 22, 2011 press statement, available at www.state.gov/r/pa/prs/ps/2011/11/177630.htm. For background on Russia's decision to suspend its observance of the CFE Treaty in 2007, see *Digest 2007* at 1001-02. The November 22, 2011 press statement confirmed that the United States remained committed to implementing the CFE Treaty with all parties other than Russia. In addition, the statement reported that the United States would voluntarily inform Russia of any significant changes in its force posture in Europe in order "to increase transparency and consistent with our longstanding effort to promote stability and build confidence in Europe."

8. Arms Trade Treaty

In 2009, Secretary Clinton announced U.S. support for negotiation of an Arms Trade Treaty to establish common international standards for the import, export, and transfer of conventional arms to help prevent the acquisition of arms by terrorists, criminals, and those who violate human rights or are subject to UN arms embargoes. See *Digest 2009* at 790-91. A conference to negotiate the treaty will occur from July 2-22, 2012 at UN Headquarters in New York. On October 17, 2011, U.S. Ambassador to the Conference on Disarmament Laura Kennedy delivered a statement on the Arms Trade Treaty in a session of the UN General Assembly's First Committee. Excerpts from her statement appear below. The full text of the statement is available at www.state.gov/s/l/c8183.htm.

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The discussions on the Arms Trade Treaty have covered a very wide range of issues and put forth myriad proposals for elements to include in a Treaty. These ideas are not all compatible, and certainly are not all universally agreed. However, I think the discussions have revealed an underlying agreement on the basic objectives of an Arms Trade Treaty, and that the United States joins in that fundamental agreement.

To reiterate what my government has said throughout these discussions, "The United States is prepared to work hard for a strong international standard...to ensure that all countries can be held to standards [in the international transfer of arms] that will actually improve the global situation." We recognize that the core concerns of this situation cannot be legislated by any Treaty, but rather are a matter of national enforcement. That is why we believe the Treaty does not have the luxury of delving into "how" member states will enact and enforce the necessary mechanisms and criteria to make it more difficult for those who would abuse arms to obtain them, but rather to concentrate on "what" needs to be the effect of the national implementation that is the core of the negotiations.

The United States continues to remind all that we need to remember this is not an arms control or disarmament Treaty we are going to negotiate—it is a trade regulation treaty. The nationally considered and approved international transfer of arms is a legitimate activity, and this

Treaty should not unduly hinder such legitimate transactions. The value we intend to add to the international system is the legal requirement for each member state to regulate such transactions on a national basis, carefully taking into consideration applicable agreed-upon standards.

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Fortunately, the nature of what we will be about lends itself to the kind of “bare-bones” approach that will be required to achieve success. As I implied earlier, it will not be necessary ... for an ATT to spell out all the details of national implementation. That properly should be left to each state. What the ATT will need to specify is the unflinching requirement that each state take unto itself the obligation to ensure that international transfers are only made on the basis of national decisions, not on the basis of a quick under-the-counter profit by an individual merchant or broker. Each state will need to consider carefully the impact of a proposed transfer, as well as the likelihood that any transfer, once it leaves the originating state may be diverted to some other more nefarious purpose, and how to control or deny support for such diverting activity. The scope of required regulation should be clear, though its specifics can be left to national implementation. And the Conference must be unequivocal in making enforcement of the Treaty’s provisions a national, rather than international or multilateral, responsibility of each State Party. Each State Party will need to report to other State Parties on the actions that it is taking to implement the Treaty—details on the national control system that it has in place and on changes to that system as well as information on covered items transferred pursuant to the provisions of the treaty.

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9. Arms Embargoes

See Chapter 16.

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Cross References

UN General Assembly resolution condemning Iran-supported terrorist plot, **Chapter 3.B.1.b.**
Constitutionality of U.S. statute enacting the Chemical Weapons Convention, **Chapter 4.B.**
Universal Periodic Review, **Chapter 6.A.3.b.**
Extrajudicial, summary, or arbitrary executions, **Chapter 6.I.2.**
Recognizing the TNC in Libya, **Chapter 9.B.2.**
Outer space, **Chapter 12.B.**
Nonproliferation-related sanctions and export controls, **Chapter 16.A.1.–3. and C.2.**
Conflict avoidance and atrocities prevention, **Chapter 17.C.**